TIPPING THE SCALES: EXPLORING STRUCTURAL IMBALANCE IN THE ADJUDICATION OF INTERACTIONS BETWEEN FREE MOVEMENT AND FUNDAMENTAL RIGHTS

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ABSTRACT

The *Viking* and *Laval* cases have reignited persistent concern within the literature, first remarked upon following the *Schmidberger* ruling, that fundamental rights are structurally subjugated to free movement, within the European Union legal order, by the Court of Justice's adjudicative methodology. Specifically, criticism has focused on the procedural disadvantage faced by fundamental rights as a result of the Court's two-stage breach/justification approach. At stage one, a restriction of the applicable market freedom is established. At stage two, the relevant fundamental right is required to 'defend' itself against this *prima facie* unlawful conduct and therefore overcome the evidential hurdles operating at the justification phase, namely, legitimacy of aim, necessity, appropriateness, and general proportionality. It has been frequently argued that this places fundamental rights on the 'back-foot'. Nevertheless, a two-stage breach/justification model still dominates, even after the extensive criticism that *Viking* and *Laval* provoked. Moreover, to date, a large-scale examination of *why* the Court approaches conflicts between the market freedoms and fundamental rights in this way, precisely *why* it is problematic, and *how* it might be overcome, in conformity with the Union's constitutional requirements, is generally absent from the literature.

This thesis seeks to plug this gap. It conducts an essential diagnostic analysis in order to identify the causes of the procedural prioritisation of free movement and the impact of the imbalanced architecture of the Court's decision-making on fundamental rights. Significantly, it demonstrates that the use of a two-stage breach/justification framework is the product of an historical hangover rooted in the economic foundations of the EU's predecessor, the EEC. Since the central purpose of the Rome Treaty was economic integration through the creation of a common market, and a key tool in achieving this was the free movement of goods, workers, services/establishment, and capital, it was logical for the Court to employ a method of adjudication that presented conflicting Member State law and policy as a *prima facie* 'wrong' in need of justification. Critically, since the market freedoms were not initially directly effective and could only be triggered by protectionist and/or directly discriminatory Member State conduct, they were generally unlikely to interact with fundamental rights.

However, crucially, the thesis identifies a trinity of significant and overlapping constitutional developments, all of which have contributed to an escalation of conflict between free movement and fundamental rights but which have also, ironically, reinforced the

breach/justification framework, and therefore the procedural prioritisation of free movement. Specifically, this constitutional trinity is comprised of: the expansion of the material and personal scope of the free movement provisions; the recognition of the direct effect of the market freedoms; and the introduction of Union citizenship.

The thesis also offers an important assessment of the effects of this exacerbation of structural bias from practical, theoretical and Union constitutional perspectives. In particular, a trio of negative consequences emerges from the fact that, under the two-stage model, only fundamental rights, and not free movement, face questions of proportionality. Crucially, this issue is normally assessed by reference to whether there are means of safeguarding fundamental rights that are less restrictive of free movement. This can limit the legal space for the consideration of crucial factors including, first, the need for idiosyncratic rights protection within particular Member States; second, the fact that, in some situations, certain fundamental rights, such as the right to strike, are inherently restrictive of free movement; and, third, that measures less restrictive of free movement will not always be feasible when budgetary or administrative considerations are taken into account. This is especially true of fundamental rights of a programmatic nature.

From a theoretical point of view, the structural subjugation of fundamental rights presents a challenge to their status as universal inviolable absolutes that represent the basic needs central to our human dignity. Alternatively, a procedural preference for free movement over fundamental rights undermines the 'social fact' of fundamental rights within the EU legal order, which the Treaties explicitly commit the Union to respecting. Indeed, an interrogation of the constitutional implications of the breach/justification framework demonstrates that it is out of line with the EU's contemporary constitutional framework. In particular, the thesis charts the evolution of the Union's goals beyond economic integration and notes that, in relation to some of its new objectives, the Treaties confer only shared or complementary legislative competence upon the Union. This necessitates a model that permits the Member States sufficient space to pursue these aims, many of which overlap with fundamental rights concerns, away from the shadow of a breach of free movement. A procedural preference for free movement is also particularly unsuitable in the post-Lisbon era in which the Union is formally obliged to accede to the European Convention on Human Rights and in which the Union's own Charter of Fundamental Rights enjoys primary law status.

Ultimately, the thesis advances a *balancing* model as an alternative method of adjudication more suited to the Union's contemporary constitutional requirements. Study of this model is pertinent due to its increasing relevance both in the academic commentary and in the case-law of the Court of Justice concerning rights clashes occurring at the level of secondary Union legislation, and in the approach of the European Court of Human Rights in the context of conflict between Convention rights. A balancing methodology recognises the equal legal status of conflicting norms and seeks to reconcile and find compromise between opposing rules in order to locate an outcome that is least restrictive of both norms. Nevertheless, the commentary to date has not yet dealt fully with the potential practical and conceptual obstacles to adopting a balancing methodology. Specifically, equal legal status does not provide a concrete means of resolving tensions between free movement and fundamental rights when they collide. Moreover, balancing introduces the conceptual question of whether free movement should be treated as (equal to) a fundamental right. The thesis argues that these challenges can be overcome. Specifically, balancing can offer concrete outcomes through a process of *reciprocal* proportionality assessment whereby the relative impacts of free movement and fundamental rights on *each other* are analysed. Finally, drawing on the undeniable constitutional significance of free movement within the Union legal order, and its importance to the EU citizen, the thesis argues that free movement should be recognised as a fundamental right within the Union's own legal framework or, at the very least, as a norm of equal rank.

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Regulations (Chronological order)

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Greece

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Poland

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Sweden

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PREFACE

The law is stated as it stood on 22nd September 2014.

However, owing to some relevant developments in the case-law occurring after this date, reference is made to more recent judgments where this is particularly pertinent in order to ensure the currency of this work.

Chapter One

INTRODUCTION: ANALYSING THE ADJUDICATION OF INTERACTIONS BETWEEN FREE MOVEMENT AND FUNDAMENTAL RIGHTS

1. Introduction

1.1. Introducing the thesis

In 2007 the European Union's Court of Justice (CJEU/the Court/the Luxembourg Court) delivered its now (in)famous decisions in *Viking* and *Laval*.[1] The cases saw the exercise of the fundamental right to strike by trade unions[2] constitute a restriction on Articles 49 and 56 TFEU,[3] concerning the freedom of establishment and the free provision of services, respectively. The judgments provoked, and continue to elicit, what is arguably an unprecedented response from the literature both in terms of volume and the overall level of disquiet surrounding the decisions.[4] Indeed, *Viking* and *Laval* have commanded the attention of those working from both theoretical and doctrinal perspectives within a range of legal disciplines (and beyond),[5] including, but not restricted to: competition law,[6] maritime law,[7] labour law,[8] human rights law,[9] internal market law,[10] and national[11] and EU constitutional

[1] Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] EU:C:2007:809

[2] The Court itself recognised the right to strike as fundamental: paras.43-44, *Viking*; paras.90-91, *Laval*

[3] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 326/47 (TFEU).

[4] The EU's legal database, EUR-lex, alone cites 93 articles on *Viking* and 110 concerning *Laval*

[5] Within political science, A. Davesne, 'The Laval Case and the Future of Labour Relations in Sweden', (2009) Les Cahiers Européens de Sciences-Po 1

[6] T. Novitz, 'Taking Collective Action: The Consequences of the Judgments in *Viking* and *Laval*' (2008) 7 Competition Law Insight 10

[7] O. Raison, P. Chaumette, 'L'arrêt Viking Line sur les entraves syndicales à la liberté d'établissement' (2009) Le droit maritime français 794

[8] C. Barnard, S. Deakin, 'European Labour Law after *Laval*' in M. Moreau (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011), ch.16; S. Currie, 'Men on the Sidelines: The Reconciliation of Work and Family Life Agenda in the Context of Cross-Border Posting, (2013) 35(3) J. Soc. Wel. & Fam. L. 389

[9] K. Ewing, J. Hendy, 'The Dramatic Implications of *Demir and Baykara*', (2010) ILJ 2; A. Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', (2013) 9 ULRev 104

[10] V. Trstenjak, E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU', (2013) ELRev 293

law.[12] Although some commentators have welcomed the judgments as an opportunity to re-think the relationship between the European Union's (EU/the Union) market freedoms and social rights,[13] one overwhelming message emanating from the literature has been the concern that these decisions demonstrate the subjugation of the fundamental right to strike to the freedom of establishment and the free provision of services. This, itself, has invited diverse research covering the overlapping areas of, *inter alia*: the substantive issues arising from presenting the right to strike as a breach of free movement,[14] and the wider consequences this has for national social models;[15] the relative positions of market freedoms and social rights within the Union's constitution;[16] and the architecture of the Court's decision-making in resolving clashes between free movement and collective action.[17]

Regarding the last of these areas of concern – i.e. how the CJEU structures its approach to tensions between the market freedoms and exercise of the right to strike – commentators have argued that the latter was procedurally disadvantaged by the Court's adjudicative architecture. Specifically, the CJEU employed a two-stage breach/justification model to resolve the disputes in both *Viking* and *Laval*. At stage one, a restriction of the relevant free movement provision was established. At stage two, the right to strike was required to 'defend' itself against this *prima facie* unlawful conduct and therefore overcome the justificatory hurdles operating at this stage, namely questions of legitimacy of aim, necessity, appropriateness, and general proportionality. Accordingly, this two-stage methodology places the right to strike on the 'back-foot', structurally subjugating it to free movement.[18]

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[11] P. Perinetto, 'Viking and Laval: An Italian Perspective – A Case of No Impact', (2012) 3(4) European Labour Law Journal 270

[12] A. Dashwood, '*Viking* and *Laval*: issues of horizontal direct effect' (2007-2008) CYELS 525; V. Trstenjak, E. Beysen, n.10

[13] H. Micklitz, 'Three Questions to the Opponents of the *Viking* and *Laval* Judgments' (2012) 8 OSE 1

[14] A. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37(2) ILJ 126; S. Picard, 'Collective Action versus Free Movement: The *Viking* and *Laval* cases' (2008) 14(1) European Review of Labour & Research 160

[15] M. Rönnmar, 'Free Movement of Services vs National Labour Law and Industrial Relations Systems: Understanding the Laval Case from a Swedish and Nordic Perspective' (2007-2008) CYELS 493; Perinetto, n.11

[16] N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ' (2008) GLJ 159; P. Sypris, T. Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33(3) ELRev 411

[17] C. Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 CLJ 262; S. Picard n.14; Sypris, Novitz, ibid, 422-425

[18] Ibid.

However, the structure of the Court's decision-making in *Viking* and *Laval* is consistent with its standard approach to clashes between free movement and competing law and policy, including fundamental rights.[19] Indeed, the potential threat such a model poses to fundamental rights was first identified by Brown, following the earlier case of *Schmidberger*,[20] who argued that 'as a matter of principle, it should not be for those who are invoking protection of their human rights…to have to justify themselves'.[21] And yet, the two-stage model remains the Court's predominant methodology today, even after the large-scale criticism that the *Viking* and *Laval* cases engendered.[22] Nevertheless, there is incipient acknowledgement, explicit amongst some of the Advocates General, and implied in one judgment of the Court, that this model is ill-suited to the Union's contemporary constitutional framework.[23]

Thus, the issue remains a pertinent one, and is of wider application than the relationship between free movement and the fundamental right to strike. This poses the question of *why* the Court approaches conflicts between free movement and fundamental rights in this way and, if it is problematic, *how* it might be overcome. Although a significant proportion of the literature acknowledges that the prioritisation of free movement is intrinsic to the structure of the Court's decision-making,[24] while others have sought to offer alternatives to its imbalanced architectural design,[25] a large-scale examination of both the origins of this procedural bias and of the feasibility of proposed reforms, from practical and Union constitutional perspectives, is generally absent.[26]

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[19] On general law and policy see: Case 95/81 *Commission v Italy* [1982] EU:C:1982:216; Case 4/75 *Rewe Zentralefinanz v Landwirtschaftskammer* [1975] EU:C:1975:98. For application to fundamental rights: Case C-112/00 *Schmidberger* [2003] EU:C:2003:333; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* [1997] EU:C:1997:325; Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn* [2004] EU:C:2004:614

[20] Ibid

[21] C. Brown, 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.', (2003) 40 CMLRev 1499, 1508

[22] Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* [2014] EU:C:2014:2235; Case C-197/11 *Eric Libert a.o. v Gouvernement flamand* [2013] EU:C:2013:288; Joined Cases C-344/13 *Blanco* C-367/13 *Fabretti v Agenzia delle Entrate* [2014] EU:C:2014:2311; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] EU:C:2008:85

[23] Opinion of AG Trstenjak, Case C-271/08 *Commission v Germany* [2010] EU:C:2010:183 and the judgment of the Court EU:C:2010:426; Opinion of AG Cruz Villalón, Case C-515/08 *Santos Palhota a.o.* [2010] EU:C:2010:245

[24] N.17

[25] Barnard, Deakin, n.8; Trstenjak, Beysen n.10; S. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9(1) ULR 169

[26] In one sizeable contribution A. Torres Perez explores constitutional pluralism and judicial dialogue as an alternative method of supranational adjudication: *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, (OUP, 2009); on the use of deference, see J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2011) 17(1) ELJ 80. Nevertheless, there remains a lack of consideration of whether proposed alternatives are feasible within the Court's current *procedural* framework for resolving

Accordingly, this thesis has two critical functions. First, it will run an essential diagnostic analysis of the *causes* of this procedural prioritisation and its *impact* on the protection or exercise of fundamental rights, demonstrating that it is indeed problematic. The thesis will postulate that the use of a two-stage breach/justification model for interactions between free movement and fundamental rights is the result of an historic hangover rooted in the economic foundations of the EU's predecessor, the European Economic Community (EEC). Specifically, in light of the centrality of free movement to the EEC's fundamental purpose, economic integration through the creation of a common market, it is unsurprising to see the Court utilise a two-stage approach in its early case-law, presenting Member State activity that conflicted with free movement as a *prima facie* 'breach' in need of 'justification'.[27] Since the free movement provisions could only be triggered by protectionist or directly discriminatory policy, the procedural prioritisation of free movement would arguably tackle exactly the sort of conduct that the Member States sought to eradicate when they created the EEC. Further, as the apparatus of economic integration, the Treaty free movement provisions seemingly did not anticipate their being invoked by or against individuals.

Consequently and crucially, from a fundamental rights perspective the two-stage approach did not initially appear problematic. It seemed unlikely that free movement, or the internal market more broadly, would interact with fundamental rights. Indeed, the EEC Treaty made no provision for this eventuality. Nevertheless, if maintained, it contained the latent risk of becoming, at best, inappropriate, and at worst, potentially damaging, should free movement evolve in a way that brought it into more frequent contact with fundamental rights. However, the expansion of free movement into new policy areas, for instance by means of the extension of the scope of the market freedoms beyond directly discriminatory conduct, has resulted in a 'steep increase'[28] in contact between free movement and fundamental rights. In this regard, *Viking* and *Laval* are just two high-profile examples of a larger scale phenomenon.[29] Critically, this development has not inspired alteration in the Court's adjudicative processes.

normative conflicts. Accordingly, this thesis makes a new, and vital, contribution by interrogating the effects of the structure of the Court's decision-making and exploring the feasibility of alternative adjudicative models.

[27] Case 4/75 *Rewe Zentralefinanz* n.19; Case 192/73 *Van Zuylen v Hag AG* [1974] EU:C:1974:72; Case 5/77 *Tedeschi v Denkavit* [1977] EU:C:1977:144

[28] Trstenjak, Beysen, n.10, 293

[29] See famously, but amongst others, Case C-112/00 *Schmidberger*; Case C-368/95 *Familiapress*; Case C-36/02 *Omega*, n.19 and Case C-244/06 *Dynamic Medien*, n.22

Instead, the two-stage approach has been maintained, even reinforced, for these new free movement dynamics.

A central task for this thesis, then, is to unpack the key historical, constitutional developments that have contributed to increased contact between free movement and fundamental rights but that have also, ironically, cemented the procedural favouring of the former over the latter. Thus, across three chapters, the thesis will demonstrate the impact of the broadening of the scope of the free movement provisions, the doctrine of direct effect, and the introduction of Union citizenship on both the frequency of conflict between the market freedoms and fundamental rights and the reinforcement of the breach/justification methodology. These pivotal developments can be termed a 'constitutional trinity' since their contributions to a structural preference for free movement cannot be cleanly delineated from one another; rather, their respective reinforcements of procedural imbalance are overlapping and interlocking.

Thus, chapter two will assess the impact of the expansion of both the material and personal scope of the free movement provisions on their relationship with fundamental rights. It will demonstrate that the evolution of what constitutes a breach of free movement, from protectionist or directly discriminatory measures to restrictions on market access, has resulted in a significant increase in the volume of interactions between free movement and fundamental rights. Similarly, the broadening of the personal scope of the free movement provisions has made a direct contribution to the classification of a greater quantity of fundamental rights endeavours as restrictions on free movement. The chapter will underline that, while the Court has recognised, in a substantive sense,[30] that these expansions cause free movement to engage with qualitatively different Member State activity, this has, crucially, not been matched by an alteration to the structure of the Court's decision-making. Indeed, the architectural imbalance inherent in the two-stage approach was not only maintained but exacerbated by this constitutional development since it resulted in a (general) lowering of the evidentiary burden imposed at the breach stage, widening the evidentiary gap between breach and justification. The chapter will then argue that this can result in lower standards of fundamental rights protection in real terms. In particular, it will identify an 'impact trio': three concrete consequences for the safeguarding of fundamental rights of adjudicating free movement/fundamental rights tensions through a two-stage approach. First, since it is tilted in

[30] Through the introduction of the mandatory requirements: Case C-120/78 *Rewe v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* [1979] EU:C:1979:42

favour of free movement, the breach/justification framework seeks outcomes that are least restrictive of it. This can reduce the legal space for consideration of the idiosyncratic fundamental rights needs of certain Member States. For instance, a Member State might need to protect the fundamental right to freedom of expression in a specific way due to a paucity of press diversity, particular to that Member State. Second, the breach/justification structure limits capacity for acknowledging that certain fundamental rights, such as the right to strike, can be inherently restrictive of free movement. Third, alternatives to Member State programmes for the protection of fundamental social rights might be less restrictive of free movement but are not always feasible when logistical and budgetary considerations are taken into account. Although the analysis will be developed for the first time in chapter two, since the effects of the two-stage model are a central exploration of the thesis, this impact trio will be revisited in subsequent chapters.

Chapter three analyses the consequence of the conferral of direct effect on the free movement provisions from a fundamental rights perspective. While there is an appreciable body of literature on the effects of extending the horizontal effect of Articles 49 and 56 TFEU onto trade unions or private parties, including its impact on fundamental rights,[31] this avenue of post-*Viking/Laval* research generally exists independently from research dedicated to investigating the structural subjugation of fundamental rights to the free movement provisions.[32] This chapter posits that these two important features of *Viking* and *Laval* are mutually reinforcing rather than mutually exclusive. It will demonstrate the significance of the doctrine as both an indirect and direct contributor to structural bias. First, in order to meet the *Van Gend* criteria for direct effect,[33] the free movement provisions have been presented as 'unconditional' and 'precise', while derogations from them must be interpreted 'strictly'. This both reinforces and legitimises an adjudicative architecture that prioritises free movement over conflicting activity. Further, the direct effect of the free movement provisions allows individuals to invoke them directly before their national courts. This introduces and/or strengthens the use of rights language in relation to the market freedoms, which, of itself, encourages the prioritisation of free movement since it becomes akin to a fundamental right. The impact of direct effect is particularly potent as a result of the twin forces of primacy and

[31] Dashwood, n.12; D. Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality After Viking and Mangold, and the Implications for Community Competence', (2008) 4 CYELP 1.
[32] Though see H. Schepel, 'Constitutionalising the Market, Marketising the Constitution, and to Tell the Difference: On the Horizontal Application of the Free Movement Provisions in EU Law' (2012) 18 ELJ 177, 196-199
[33] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1

the principle of effective judicial protection. Where individuals invoke directly effective free movement provisions, national courts are required to apply them over conflicting domestic measures, with immediacy.[34] Clearly, these constitutional developments make a significant contribution to economic integration and were not introduced with the specific intention of undermining fundamental rights. Nevertheless, by solidifying, and providing outputs for, architectural bias in the adjudication of clashes between free movement and other interests, these doctrines increase the latent risk that free movement will be prioritised over fundamental rights should they interact. In this way, direct effect indirectly intensifies the structural subjugation of fundamental rights. Second, the principle also makes a more direct contribution to this phenomenon in two ways. The evolution of the doctrine from vertical through to horizontal direct effect greatly increases the frequency of interaction between free movement and fundamental rights. It also alters the nature of the interface, requiring private parties, in certain circumstances, to rely on justifications, designed primarily for Member State actors, to defend their exercise of fundamental rights.

The final constitutional development explored in this thesis is the genesis and evolution of Union citizenship. Chapter four will examine both the indirect and direct contributions that Union citizenship makes to the exposure of fundamental rights to free movement bias. Specifically, the chapter will argue that by adopting free movement as the core right of the Union citizen, citizenship has elevated free movement to a fundamental right. This lends legitimacy to, and intensifies the need for, an adjudicative model that favours free movement over conflicting activity. Within the specific confines of citizenship, where free movement largely runs *congruent to* fundamental rights, this is generally viewed as enhancing the fundamental rights of Union citizens.[35] However, a deeper analysis demonstrates that this enriched fundamental rights protection is only possible as a corollary of the structural boost that Union citizenship offers to free movement. Thus, citizenship's reinforcement of the two-stage approach contains the potential indirectly to subject fundamental rights to a strengthened free movement bias where the former *clashes with* the latter. Indeed, since the free movement operating under Union citizenship is built upon *economic* free movement, such indirect support for the two-stage model can cross-pollinate across shared legal structures into the internal market, where instances of conflict are more likely. Union

[34] Combined effect of Case 6/64 *Costa v ENEL* [1964] EU:C:1964:66 and Case 106/77 *Adminstrazione delle Finanza dello Stato v Simmenthal* [1978] EU:C:1978:49

[35] C.f. C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 CMLRev 1643

citizenship also *directly* impacts on interactions between free movement and fundamental rights. First, it creates new situations in which the protection of fundamental rights can be viewed as restrictive of free movement and consequently processed through the breach/justification model. For instance, complex programmes designed by the Member States for the protection of fundamental social rights have been challenged as barriers to the exercise of free movement rights by individual Union citizens. Second, the fundamentality of free movement to the Union citizen has raised the evidentiary burden at the justification stage, arguably making it harder for conflicting fundamental rights to overcome the procedural disadvantage they face as part of the Court's two-stage methodology. In particular, the focus on finding alternatives less restrictive of free movement can inhibit consideration of the effectiveness of fundamental rights measures or the practical aspects of implementing fundamental social rights.

If chapters one to four are concerned with detailing *why* free movement has come into more frequent contact with fundamental rights and *why* the two-stage model was nevertheless retained, chapter five performs the second essential function of this thesis: it considers *how* to overcome the structural subjugation of fundamental rights to the free movement provisions and addresses potential practical and conceptual issues arising from proposed alternatives. In particular, the chapter assesses the feasibility of adopting a rights-*balancing* approach for the adjudication of clashes between free movement and fundamental rights. Such a model would present them as hierarchically equal, as opposed to putting fundamental rights at a procedural disadvantage. The assessment of a balancing model is particularly pertinent for a number of reasons. Following the coming into force of the Lisbon Treaty,[36] balancing is increasingly used by the CJEU in the context of clashes between two fundamental rights operating under the Union's own Charter of Fundamental Rights (the Charter/CFR).[37] It is also utilised by the European Court of Human Rights (ECtHR/the Strasbourg Court) when two rights protected by the European Convention on Human Rights[38] (ECHR/the Convention) come into conflict.[39] Significantly, it is has also been suggested as a viable alternative to the two-stage approach in the specific context of free movement by an Advocate General and impliedly

[36] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01 (TL)
[37] Charter of Fundamental Rights of the European Union [2012] OJ C-326/02 (CFR). E.g. Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] EU:C:2012:526; Case C-283/11 *Sky Österreich v Österreichischer Rundfunk* [2013] EU:C:2013:28
[38] European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
[39] *Kokkinakis v Greece*, App.no:14307/88; *Kutzner v Germany*, App.no:46544/99

adopted by the Court in one case.[40] Additionally, this proposed alternative has been welcomed in the academic commentary.[41] For instance, Trstenjak and Beysen have argued that it is imperative that the principle of equal ranking between free movement and fundamental rights is recognised during the resolution of tensions between them.[42] They advance balancing as 'best suited to achiev[ing] an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms in the case of collision'.[43]

Nevertheless, one writer argues that, in terms of offering concrete solutions, 'equal legal status does not signal an obvious way forward when values collide'.[44] Accordingly, chapter five addresses the practical aspects of introducing a balancing model. In particular, it argues that a system of *reciprocal* proportionality, through *mutual* impact assessment, should be introduced. Whereas the two-stage model principally pursues methods of fundamental rights protection that are least restrictive of free movement, this approach would analyse the effects of free movement and fundamental rights *on each other*, seeking an outcome that is least restrictive of *both* free movement and fundamental rights. This creates more legal space for the consideration of the effects of free movement on the fundamental rights 'impact trio' outlined above. The chapter appreciates that such a model will require the Court to accept the operation of a *qualitative de minimis* threshold in relation to free movement and will argue that it is for the Court to lay down general guidance in this regard. For instance, direct discrimination might be viewed as having automatically serious effects on free movement, whereas restrictions to market access might require the demonstration of interference. Regardless, any level of restriction would still have to be weighed against its relative impact on fundamental rights. It will be argued that this task should be left to the national courts.

The chapter also acknowledges that there are potential conceptual obstacles to the introduction of a balancing model, specifically because it treats free movement as the same as, or at least equal to, a fundamental right. Grounded in legal positivism, and drawing on the broad constitutional significance of free movement, including to the Union citizen, the chapter will posit that free movement should be recognised as a fundamental right within the EU legal order, or, at the very least, as a norm of equal constitutional rank.

[40] Opinion of AG Trstenjak, Case C-271/08 *Commission v Germany*, n.23
[41] N.25
[42] Trstenjak, Beysen, n.10, 315
[43] At 314
[44] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, (OUP, 2013) 47

1.1.1. Analysing the architecture of the Court's decision-making: a doctrinal, case-focused methodology

Since this thesis interrogates the structure of the Court's adjudication of tensions between free movement and fundamental rights and assesses the impact of key constitutional developments on the formulation of the CJEU's current adjudicative framework, a doctrinal, black-letter approach has been the principal research methodology. Specifically, a comprehensive review of the free movement case-law was conducted not only to identify the use of a two-stage breach/justification model for resolving conflict between free movement and fundamental rights, but also to site this within the broader use of this architecture for free movement conflicts generally. Such an approach, alongside examination of the EU Treaties, was also imperative in order to ensure an accurate historical appraisal of the constitutional significance of free movement, as an explanation for the breach/justification framework, and to chart the evolution of free movement from a 'fundamental principle of the common market' to a 'fundamental freedom' of the Union. In addition, a black-letter approach was vital to demonstrating that key constitutional developments - such as direct effect, or the extension of the scope of the market freedoms to cover restrictions to market access - had a direct impact on the volume of interactions between free movement and fundamental rights. Case-law also provided clear evidence that the 'constitutional trinity' discussed in chapters two, three and four had a demonstrable effect on fundamental rights standards in respect of the 'impact trio'. Since the thesis covers such significant constitutional developments, however, it will frequently recall seminal and much-discussed judgments of the CJEU. The originality of the thesis lies in its analysis of these decisions in terms of their consequent impact on the structural prioritisation of free movement over fundamental rights. Thus, although the discussion will understandably and inevitably focus on case-law upon which much ink has already been spilled, reference will consistently be made in the footnotes to a wider range of case-law confirming the central arguments posited.

The case-law review was accompanied by a black-letter analysis of the Union's constitutional remit as contained within the Treaties as well as engagement with theoretical justifications for the existence and safeguarding of fundamental rights. This was essential for establishing that the two-stage breach/justification model is, in fact, problematic when pitched against the

contemporary constitutional framework. In other words, while it explores the reality of the structural subjugation of fundamental rights to the free movement provisions, the thesis does not seek, globally, to make a normative statement in this regard. Rather, the emphasis is on pausing to take stock of whether historically-entrenched and well-established judicial approaches remain suited to the needs of the present-day European Union. Although, overall, the thesis argues, firmly, that the breach/justification framework no longer serves the EU's contemporary constitutional requirements, the decision to conduct an historical diagnostic analysis has proved significant in demonstrating that the structural subjugation of fundamental rights is not necessarily the work of a biased Court determined to prioritise economic integration over other endeavours. Rather, it is the product of history; of intertwined and intersecting constitutional developments that, when viewed in isolation are largely logical, and not directly connected to fundamental rights, but which nevertheless come together to put fundamental rights at a procedural disadvantage.

1.2. Introducing the introduction: siting the discussion, setting the parameters, and identifying overarching themes

A thesis that approaches such major constitutional developments in the Union's history is inevitably going to be broad in nature. The *Viking* and *Laval* cases, the expansion of the material and personal scope of the free movement provisions, the doctrine of direct effect, and the introduction of Union citizenship all merit, and have indeed stimulated, significant examination in their own right. Moreover, while each component of our constitutional trinity, explored in chapters two, three, and four has individually contributed to free movement bias, they have not done so in a linear or chronological fashion. Rarely has each constitutional expansion been solely responsible for, or deliberately designed to produce, the fundamental rights consequences discussed in those chapters. Rather, as noted above, they form integral parts of the organic evolution of the wider Union legal order and create an interconnected web of indirect and direct contributors to the procedural prioritisation of free movement over fundamental rights. This presents a significant structural challenge to the thesis.

Consequently, the rest of this chapter serves two core functions: to set the parameters of the analysis within what is potentially a very wide field of investigation; and to provide an overview of cross-cutting themes, in order to minimise the risk of over-emphasising the

responsibility of particular constitutional developments for the genesis and maintenance of the two-stage approach. Thus, chapter one will prove to be an unusually substantial introductory chapter that is, nevertheless, justified as a result of its role as a reference for the central issues unpacked in the rest of the thesis. Specifically, section two will provide the factual backdrop to the analysis. It will outline the broad history of the Union's relationship with fundamental rights and detail the key cases that have reignited the debate about the Union's capacity for fundamental rights protection.

Section three will reiterate that, while there may also be substantive reasons for the subjugation of the fundamental right to strike in the *Viking* and *Laval* cases, this thesis will focus on the wider issue of the *structure* of the Court's approach to addressing conflict between free movement and fundamental rights generally. It will demonstrate the existence of a two-stage model for the adjudication of clashes between free movement and competing interests, which by offering procedural priority to free movement, structurally presents it as a fundamental right. The section will acknowledge the utility of such a framework in the historical context of the central, economic, aims of the EEC. Nevertheless, a review of well-established case-law will confirm that this structure has been maintained in instances of clash between free movement and fundamental rights. In this context, the two-stage approach does not 'merely' treat free movement as equivalent to a fundamental right but as *more* fundamental.

Section four will explore the consequences of an imbalanced adjudicative model from practical, theoretical, and constitutional perspectives. In short, the section is concerned with whether, and why, the two-stage approach is problematic. Examining the various fundamental rights outcomes that the structural prioritisation of free movement can produce, the section will acknowledge, first, that the two-stage model, in some situations, allows fundamental rights and free movement to benefit each other. Moreover, the exercise of free movement can also create fundamental rights clashes that only exist as a result of the operation of an internal market. Nevertheless, the section will highlight that the thesis is principally concerned with situations of *clash* between free movement and fundamental rights. Consequently, the section will provide an overview, developed in subsequent chapters, of the practical implications of placing a heavier burden of proof, by means of the principle of proportionality, on those who, through the protection or exercise of fundamental rights, find themselves accused of a *prima facie* unlawful restriction of free movement.

The section also uses theoretical perspectives to examine why the subjugation of fundamental rights to free movement is particularly problematic, as compared with the general prioritisation of free movement over competing public interests. In short, it recognises that the thesis rests on a (contested) presumption that fundamental rights warrant special protection. However, since engaging with these debates is not the central objective of the analysis, it will, instead, acknowledge them and identify established justifications for safeguarding fundamental rights. In particular, it will draw on the existence of fundamental rights as a social fact and the Union's own explicit commitment to respecting them in its primary law. Thus, this thesis plays an important role in testing whether the Union meets the obligations that, through the agreement of its Member States, it has imposed upon itself. This analysis will also lay the definitional framework for detailing what constitutes a 'fundamental right' for the purposes of the thesis and for the issue, explored in chapter five, of whether free movement can itself constitute a fundamental right.

The notion that fundamental rights merit special protection, because the Union has committed itself to respecting them, introduces questions as to the constitutional implications of the two-stage approach. Consequently, with particular, though not exclusive, focus on the amendments brought about by the Lisbon Treaty, the final part of section four will unpack the evolution of the Union's goals in order to argue that the Court's current adjudicative model is out of line with the contemporary constitutional framework. The Union's future accession to the ECHR and the primary law status of the Union's own Charter will be presented as particularly significant drivers of change.

2. (Re)igniting the debate: *Viking* and *Laval* as indicators of a preference for free movement over conflicting fundamental rights

In a thesis focused on the historical, constitutional developments behind the apparent prioritisation of the free movement provisions over fundamental rights, it is worth pausing to outline the wider history of the relationship between the Union and fundamental rights. Since *Viking* and *Laval* have reinvigorated the debate, in this regard, it is also useful to provide the material facts of these cases, and to position them within existing critiques as to the capacity

of the Union's legal order to respect fundamental rights in the context of economic integration.

2.1. The historical relationship between the Union and fundamental rights

Students of EU law are well-versed in the incremental and, at least initially, reactive introduction of fundamental rights considerations within the EU legal order. While a glance at the most recent incarnation of the Union's Treaties, particularly after the amendments introduced at Lisbon, might suggest that fundamental rights occupy a central position within the Union's constitutional framework,[45] this lies in stark contrast to the (absence of) fundamental rights provision in the Rome Treaty, the foundational text of the EEC.[46] That document set, as the EEC's central task, *economic* integration through the creation of a common market.[47] Reference to fundamental rights was seemingly not relevant within a Treaty charged with constituting such a polity and was not included in its text.[48]

And yet, litigants soon began to argue that the pursuit of economic integration was affecting their fundamental rights. Although the CJEU was initially reluctant to introduce fundamental rights considerations into the EU's legal order,[49] in *Stauder* it accepted that the interpretation of internal market rules could incorporate 'the fundamental rights enshrined in the general principles of Community law and protected by the Court'.[50] Soon after, in its seminal *Internationale Handelsgesellschaft* decision, the Court held that, while domestic fundamental rights norms could not pose a challenge to the validity of EU law, Union legislation could be

[45] *Inter alia*, the preamble to the TEU (Consolidated version of the Treaty on European Union [2012] OJ C326/13) confirms the attachment of the EU Member States to 'respect for human rights'; Art.2(2) states that '[t]he Union is founded on [*inter alia*] respect for human rights'; Art.6(1) TEU bestows primary law status on the Charter; Art.6(2) TEU commits the Union to acceding to the ECHR.
[46] Treaty Establishing the European Economic Community [1957]
[47] Art.2 EEC
[48] A richer analysis of the background to the creation of the EEC does demonstrate fundamental rights considerations. For instance, the draft European Political Community Treaty would have integrated the ECHR within the law of that polity. While this arguably increases the potential significance of the absence of a reference to fundamental rights in the Rome Treaty, that document itself can be said to acknowledge goals beyond economic integration. Its preamble seeks to 'lay the foundations of an ever-closer union among the peoples of Europe' and to 'ensure…the social progress' of the Member States. However, crucially, Art.2 EEC presents this as achievable through the medium of the common market. For discussion of this history, see M, Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 ELRev 398, 399
[49] Case 1/58 *Stork v High Authority* [1959] EU:C:1959:4; Joined cases 36-38, 40/59 *Geitling v High Authority* [1960] EU:C:1960:36; Case 40/64 *Sgarlata a.o. v Commission* [1965] EU:C:1965:36
[50] Case 29/69 *Stauder v City of Ulm* [1969] EU:C:1969:57

assessed by reference to analogous guarantees existing at EU-level. Fundamental rights formed an integral part of the general principles of Union law, were inspired by the constitutional traditions common to the Member States, but operated within the structure and objectives of the Union.[51] This was later confirmed in *Nold*, in which the Court also highlighted the significance of international human rights instruments, to which the Member States were signatories, to the EU fundamental rights framework.[52] The ECHR became a 'special source of inspiration' in this regard.[53] In time, the Court accepted jurisdiction not only for examining the compatibility of the activity of the EU's legislative organs with fundamental rights, but also the actions of the Member States when they were implementing[54] and, later acting in the scope of, EU law.[55]

Acknowledgement, by the EU's legislative organs, of the need to recognise fundamental rights has been similarly incremental. It was not until 1977 that the Union's legislative institutions released a joint declaration stressing the prime importance they attached to the protection of fundamental rights, particularly those derived from the constitutions of the Member States and the ECHR.[56] This commitment was endorsed by the Member States in the preamble to the Single European Act (SEA) in 1986. It was only with the Maastricht Treaty, entering into force in 1993, that respect for the fundamental rights contained in the ECHR and resulting from the common constitutional traditions of the Member States entered the main Treaty text, via Article 6 TEU.[57] Suspension of the voting rights, within the European Council, of those Member States that seriously and persistently breached fundamental rights, was not possible until the Amsterdam Treaty became effective in 1999.[58] With this Treaty, Article 6 TEU was changed to declare that that the Union was *founded* on, *inter alia*, respect for human rights. Accession to the Union also became conditional upon respect for fundamental rights.[59] The EU's own Charter of Fundamental Rights, solemnly proclaimed in 2000,[60] did not enjoy primary law status until the most recent Treaty amendments at Lisbon in

[51] Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] EU:C:1970:114, paras.3-4
[52] Case 4/73 *Nold v Commission* [1974] EU:C:1974:51, para.13
[53] Case C-260/89 *ERT v DEP* [1991] EU:C:1991:254; Case C-299/95 *Kremzow v Austria* [1997] EU:C:1997:254
[54] Case 5/88 *Wachauf v Germany* [1988] EU:C:1989:321
[55] Case C-260/89 *ERT*, n.53
[56] Joint Declaration by the European Parliament, Council, and the Commission concerning the protection of fundamental rights and the ECHR, 05/04/77 OJ C103
[57] Art.F(2), Treaty on European Union [1992] OJ C325/5 (TM)
[58] Art.7 TEU
[59] Art.O TA/Art.49 TEU
[60] [2000] OJ C364/1

2009. Similarly, after the CJEU had ruled that the EU lacked the competence to accede to the ECHR,[61] the process for formal accession to the Convention could not commence until the insertion of Article 6(2) TEU by the Lisbon Treaty.[62] Even post-Lisbon, the Union has no general fundamental rights competence.

Thus, while economic integration through the formation of a common market has always been a central objective of the Union, the relationship between the EU and fundamental rights has been more piecemeal. The historical and constitutional asymmetry between the development of the internal market, on the one hand, and the Union's commitment to fundamental rights, on the other, has invited abundant comment within the academic literature, particularly where the two interact. For instance, some have argued that the reception of fundamental rights into the EU legal order was a direct attempt to avoid the derailing of the doctrine of primacy.[63] Even after *Internationale Handelsgesellschaft,* the German *Bundesverfassungsgericht,* in its *Solange I* judgment,[64] famously rejected the primacy of EU law in light, *inter alia,* of the lack of a catalogue of fundamental rights operating at Union-level. Only after the EU had further demonstrated its commitment to fundamental rights did that court declare, in *Solange II,*[65] that it would no longer exercise jurisdiction in assessing the validity of EU legislation on fundamental rights grounds, so long as the EU offered an equivalent standard of protection to that found in the German Constitution. In a similar vein, others argue that fundamental rights protection provides a useful means of improving the legitimacy of Union activity, or that it exists (deliberately) to allow for further EU encroachment into Member State law and policy.[66] These claims are themselves hotly contested.[67] Others still have voiced concern that

[61] *Opinion 2/94* [1996] EU:C:1996:140. For criticism, see J. Weiler and S. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences' in P. Alston et al (eds), *The EU and Human Rights*, (OUP, 1999), ch.5

[62] Moreover, this process has been somewhat stalled by the CJEU's recent decision in *Opinion 2/13* [2014] EU:C:2014:2454 that the draft agreement for accession to the ECHR is not compatible with Art.6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the Convention.

[63] Following the introduction of the doctrine in Case 6/64 *Costa* n.34, a parliamentary report explicitly voiced concern that primacy could undermine domestic fundamental rights protection. F. Dehousse (MEP), 'Report on the Supremacy of EC Law over National Law of the Member States'. Eur Parl Doc 43 (1965-1966_ JO (2923) 14; J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', (1992) 29 CMLRev 669

[64] *International Handelsgesellschaft mbH v Einfuhr – und Vorratstelle für Getreide und Futtermittel* [1974] 2 CMLR 540

[65] *Re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225

[66] S. Greer, A. Williams, 'Human Rights in the Council of Europe and the EU: Towards 'Individual', 'Constitutional' or 'Institutional' Justice?', (2009) 15(4) ELJ 462; A. Williams, *EU Human Rights Policies: A Study in Irony,* (OUP, 2004) 159-160; Coppel, O'Neill, n.63

EU fundamental rights might reflect the existence, but not the substance, of the fundamental rights contained in international instruments and the constitutions of the Member States.[68] Commentators have questioned the extent of fundamental rights protection at EU-level when the scope of EU fundamental rights is frequently defined by reference to Union objectives.[69] Finally, as noted above, following the emergence of clashes between fundamental rights and the free movement provisions, Brown has argued that slotting fundamental rights considerations into the Court's existing two-stage approach, originally designed for adjudicating conflict between free movement and public interests, is ill-suited to this dynamic.[70]

Although Brown highlighted the two-stage approach as a cause for concern in the wake of the *Schmidberger* decision,[71] its use was not problematic in terms of the substantive outcome of that judgment. The fundamental rights arising in that case – the freedoms of expression and association – prevailed over the free movement of goods. The cases of *Viking* and *Laval*, on the other hand, arguably demonstrate the realisation of Brown's concerns about the structural prioritisation of free movement over fundamental rights. In this way, those cases are just one (significant) manifestation of a larger, enduring discussion surrounding the relative positions of market values and fundamental rights (and/or social goals) in the Union legal order. Nevertheless, they do reignite the debate, provoking commentators to decry apparent constitutional asymmetry with renewed vigour. As a result, the cases merit examination of their material facts.

2.2. The material facts of Viking and Laval

2.2.1. Viking

[67] G. de Búrca, 'Fundamental Rights and the Reach of EC Law', (1993) 13(3) OJLS 283 ; see also the response to Coppel and O'Neill of J. Weiler and N. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence – Part I' (1995) 32(1) CMLRev 51; and '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence - Part II' (1995) 32(2) CMLRev 579
[68] A. Williams, n.66; E. Drywood, 'Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Directive' (2007) 32(3) ELRev 396, 397; A. Davies, n.14, 139
[69] Veldman, n.9, 116-117; Coppel, O'Neill, n.63, 683, citing Case 5/88 *Wachauf* n.51. C.f. M. Koskenniemi who welcomes the CJEU's honesty in expressly acknowledging that fundamental rights are defined by political values, 'The Effects of Rights on Political Culture', in Alston et al, n.61, ch.3, 111
[70] Brown, n.21
[71] Case C-112/00 *Schmidberger*, n.19

Viking concerned a ship, the Rosella, that sailed between Estonia and Finland. Operating under the Finnish flag, the vessel's operator, Viking, was obliged, pursuant to Finnish law and the terms of collective bargaining agreements with Finnish trade unions, to pay the crew Finnish wages. The Rosella was running at a loss as a result of the competition presented by Estonian ships, plying the same route, who were able to pay their crews lower wages. Accordingly, Viking decided to re-flag the Rosella to Estonia and enter into new collective agreements with trade unions operating there. The ITF, an international federation of transport workers' unions, pursuant to its 'flags of convenience policy' which required vessels to be flagged to the State of beneficial ownership, issued a circular requesting its affiliate trade unions not to enter into negotiations with Viking. The Finnish Seamen's Union (FSU) also gave notice of strike action against Viking. In previous discussions, FSU had said it would not enter into a collective agreement with Viking without guarantees that, regardless of the re-flagging, the ship would continue to be covered by Finnish law and Finnish collective agreements; that a change of flag would not result in job losses for Viking employees, or change terms and conditions of employment. FSU was aware that its demands rendered re-flagging the Rosella pointless. Viking had stated that a change of flag would not result in redundancies. It brought an action for a court declaration that the activities of ITF and FSU were contrary to Article 49 TFEU, on the freedom of establishment. The ITF and FSU argued that they were exercising the fundamental right to take collective action. Consequently, a reference was made to the CJEU for a preliminary ruling. The referring court asked: first, whether collective action to induce an undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, falls within the scope of Article 49 TFEU; second, whether that provision could be relied on against trade unions, in other words, whether Article 49 had horizontal direct effect; and third, whether the collective action of the kind threatened by the ITF and FSU could constitute a restriction on the freedom of establishment and, if so, whether it could be justified.

In relation to the first question, the CJEU stated that the collective action concerned fell within the scope of Article 49. It recalled that Articles 45, 49, and 56 TFEU (on free movement of workers, establishment, and services, respectively) apply not only to public authorities but also to private parties regulating in a collective manner gainful employment,

self-employment, or service provision.[72] Since working conditions were governed differently across the Member States, sometimes by law and regulation and sometimes by collective agreements adopted by private persons, restricting the application of those Treaty provisions to public bodies risked inequality of application.[73] As the collective action was inextricably linked with regulating the work of Viking's employees through collective agreement, it fell within the scope of Article 49.[74] Although Article 153(5) TFEU expressly excludes collective action from the Union's legislative competence, Member States, when acting in their area of competence, were still required to comply with Union law.[75] Similarly, the Court held that, although the right to strike was a fundamental right within the Union legal order, it did not fall outwith the scope of Article 49. Exercise of that right was subject to certain restrictions, namely that it must be employed in accordance with Union law, as well as national law and practices.[76] The Court noted that it had already held that other fundamental rights, including the rights to freedom of expression and assembly, and human dignity, could constitute barriers to free movement. Nevertheless, they could also represent legitimate interests that justified restrictions 'even' on the Treaty free movement provisions.[77] Finally, distinguishing the competition law case of *Albany*,[78] the Court rejected the argument that the right to take collective action should fall outside the scope of free movement because it was inherent in the very nature of trade union activity that free movement would be prejudiced to some extent.[79]

On the second question, the Court, relying on its collective-regulator case-law, held that Article 49 could be invoked against trade unions. As it had outlined in its response to the first question, the CJEU stated that the abolition of obstacles to free movement would be compromised if associations, not governed by public law, were able to impose restrictions as part of the exercise of their legal autonomy. Even if certain provisions were formally addressed to the Member States, the prohibition on prejudicing free movement applied to all

[72] Para.33, citing Case 36/74 *Walrave and Koch* [1974] EU:C:1974:140, para.17; Case 13/76 *Donà* [1976] EU:C:1976:115, para.17; Case 415/93 *Bosman* [1995] EU:C:1995:463, para.82; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] EU:C:2000:199, para.47; Case C-281/98 *Angonese* [2000] EU:C:2000:296, para.31; and Case C-309/99 *Wouters a.o.* [2002] EU:C:2002:98, para.120
[73] Para.34, citing, by analogy, Case 36/74 *Walrave*, Case 415/93 *Bosman*, and Case C-281/98 *Angonese*, ibid.
[74] Paras.35-37
[75] Paras.39-49, citing, by analogy, Case C-120/95 *Decker* [1998] EU:C:1998:167, paras.22-23; Case C-158/96 *Kohll* [1998] EU:C:1998:171, paras.18-19; Case C-334/02 *Commission* v *France* [2004] EU:C:2004:129, para,21; Case C-446/03 *Marks & Spencer* [2005] EU:C:2005:763, para.29
[76] Paras.42-44, citing, *inter alia*, Art.28 CFR
[77] Paras.45-47, citing Case C-112/00 *Schmidberger*; Case C-36/02 *Omega*, n.19
[78] Case C-67/96 *Albany* [1999] EU:C:1999:430
[79] Para.52

agreements intended to regulate paid labour collectively.[80] However, the Court went further, relying also on *Spanish Strawberries* and *Schmidberger,*[81] to demonstrate that restrictions on free movement can be caused by the actions of private individuals and that there was 'no indication' that its previous case-law applied only to associations or organisations exercising a regulatory task or having quasi-legislative powers.[82]

The CJEU commenced its response to the third question by reiterating that Article 49 TFEU was triggered not only by discriminatory activity but by action that hindered the movement of establishments between Member States. For the Court, it was indisputable that, the FSU's collective action made Viking's exercise of free movement less attractive or even pointless: if Viking agreed to FSU's demands it would not enjoy the same treatment as other undertakings operating in Estonia. ITF's collective action was also 'at least liable to restrict Viking's exercise of its right to freedom of establishment'. A restriction on Article 49 was established.[83] The Court emphasised that a restriction on free movement could only be justified if it pursued a legitimate aim, justified by overriding reasons of the public interest, and was suitable and necessary for attaining that goal.[84] It accepted that exercise of the fundamental right to take collective action was a legitimate aim and that the protection of workers could constitute an overriding reason in the public interest.[85] The CJEU also acknowledged that the EU had not only an economic but also a social purpose.[86] Consequently, the Court recognised that the Treaty's free movement provisions must be balanced against the objectives of social policy, which included improved living and working conditions and the maintenance of dialogue between labour and management. The Court left the final decision as to whether the actions of FSU and ITF were justified to the national court, but nevertheless gave relatively clear guidance. While the actions of those organisations aimed at protecting the jobs and employment conditions of the FSU's members fell, in principle, within the objective of protecting workers, this would no longer be tenable if it were established that the jobs or conditions of employment at issue were not 'jeopardised or under

[80] Para.57-58, citing, additionally, Case 43/75 *Defrenne* [1976] EU:C:1976:56, paras.31 and 39
[81] Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] EU:C:1997:595; Case C-112/00 *Schmidberger* n.19
[82] Paras.62-65
[83] Paras.68-74
[84] Para.75, citing, *inter alia*, Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] EU:C:1995:411, para.37
[85] Para.76-77, citing Joined Cases C-369/96 and C-376/96 *Arblade a.o.* [1999] EU:C:1999:575, para.36; Case C-165/98 *Mazzoleni and ISA* [2001] EU:C:2001:162, para.27; Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte a.o.* [2001] EU:C:2001:564, para.33
[86] Paras.78-79

serious threat'.[87] Even then, the national court was still required to determine whether the collective action taken was suitable for, and did not go beyond what was necessary to achieve, the aim pursued. The CJEU accepted that collective action may be one of the main ways for trade unions to protect the interests of their members, however, it was still for the national court to consider whether the FSU 'did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations…' and whether those alternative means had been exhausted.[88]

2.2.2. Laval

In *Laval*, a company, Laval, incorporated under Latvian law, posted some of its workers to Vaxholm, Sweden, to work on a building site operated by the Swedish undertaking, Baltic. The Posted Workers Directive (PWD)[89] requires host States to ensure that undertakings posting workers to their territory guarantee the terms and conditions of employment, referred to in Article 3(1)(a)-(g), operating in that State. Article 3(7) stipulates that Article 3(1) shall not prevent the application of terms and conditions more favourable to workers, while Article 3(10) provides that the PWD does not preclude the application by Member States, in accordance with the Treaty, of terms and conditions of employment on matters other than those referred to in the 'core nucleus' of Article 3(1)(a)-(g) for reasons of public policy. Laval had already entered into collective agreements with Latvian trade unions in relation to its workers. Contact was established between Laval and Byggettan, the relevant local branch of the Swedish trade union, with a view to negotiating the signing of a collective agreement by Laval. Negotiations were, however, unsuccessful and Laval refused to sign the collective agreement. With support of the national union, Byggnads, Bygettan commenced collective action, lawful under Swedish law. During mediation, Laval refused to sign a collective agreement before the issue of wages was dealt with, since the collective agreement left wage rates to be determined later. If it had done so, the collective action would have ceased immediately and wage negotiations would have proceeded under a social truce. The collective action was extended to cover sympathy action by the Swedish Electricians' Union,

[87] Para.80-83
[88] Para.84-87. On ITF's 'flags of convenience policy' the Court noted its application irrespective of whether re-flagging was harmful to employees, para.89.
[89] Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L18/1)

Elektrikerna, and other trade unions, with the result that Laval could no longer carry out its activities in Sweden. Eventually, Vaxholm public authorities requested that the contract between Laval and Baltic be terminated. Baltic was later declared bankrupt.

Laval brought an action for a declaration that ongoing collective action should cease and for compensation from Byggettan, Byggnads, and Elektrikerna. In particular, it argued that Article 56 TFEU, on the free provision of services, precluded trade unions from using collective action to attempt to force a foreign undertaking to sign a Swedish collective agreement. Accordingly, a reference was made to the CJEU asking, first, whether Article 56 and the PWD precluded a trade union from using collective action in such a way, particularly when the terms of the relevant collective agreements exceeded both the level and content of guarantees contained in the 'core nucleus' of the PWD. The referring court's second question concerned the compatibility with Article 56 of a Swedish law, which permitted trade unions to view undertakings, bound by collective agreements operating in another Member State, as though there were not legally tied to a collective agreement at all.

Responding to the first question, the CJEU stated that the PWD was not directly applicable to the case at hand. The collective agreements contained terms and conditions going beyond the 'core nucleus' of the PWD, both in standard and content. Although Article 3(7) PWD stated that Article 3(1) did not prevent the application of terms and conditions more favourable to the worker, this could not be interpreted so as to allow host Member States to apply a higher level of protection without undermining the effectiveness of the PWD. Instead, Article 3(7) allowed the application of home State rules where these were more favourable than those operating in the host State, or for undertakings voluntarily to conclude collective agreements in the host State that offered a higher level of protection to their employees.[90] Similarly, Article 3(10) PWD could not be relied upon, in the present case, to justify the enforcement of terms and conditions going beyond the core nucleus against undertakings coming from other Member States. The obligations, contained in the collective agreements, had been established by the social partners, without the Swedish authorities' having recourse to that provision. Since trade unions were not governed by public law, they could not use public policy grounds to justify imposing restrictions on Union law.[91] Minimum rates of pay were the only issue contained in the PWD's 'core nucleus' that Sweden had not addressed through legislation.

[90] Paras.79-81
[91] Para.84

However, the relevant collective agreements, which sought to ascertain pays rates on a case-by-case basis according to the qualifications and tasks of the employees concerned, were not of 'universal' or 'general' application, as required by the PWD.[92]

The Court proceeded to assess the trade union's activity against Article 56 TFEU. As it had in *Viking*, the CJEU reiterated that although strike action was excluded from Union competence, the Member States were required to comply with EU law when acting in their own areas of legislative competence.[93] Adopting the same reasoning as it had in *Viking*, the Court accepted the fundamental rights status of strike action but rejected the argument that this precluded the application of Article 56.[94] Similarly, it relied on its collective-regulator case-law to hold that Article 56 was directly effective against the trade unions concerned.[95] The Court then concluded that collective action, whereby undertakings established in other Member States might be forced to sign a collective agreement containing terms going above but also beyond the core nucleus of the PWD, is liable to make it less attractive or more difficult for such undertakings to provide services in the host State. Consequently, a restriction on Article 56 TFEU was established. This was particularly the case where, in order to ascertain applicable rates of pay, undertakings might be forced into negotiations with the trade unions of unspecified duration.[96] Since the freedom to provide service was one of the fundamental principles of the Union, a restriction upon it was only warranted where it pursued a legitimate objective, justified by overriding reasons of the public interest, in a manner that was suitable and necessary in relation to the aim pursued. It was argued that the collective action was justified by reference to the fundamental right to strike and because it had as its objective the protection of workers. The CJEU recognised that the protection of workers could justify, in principle, a restriction on Article 56. As it had in *Viking*, it acknowledged, in addition, that the Union had a social, as well as economic, purpose. However, the Court concluded that the specific obligations that the trade union sought to impose on Laval could not be justified by the aim of worker protection since they went beyond the core nucleus of protection contained in the PWD. On the specific issue of pay, collective action to impose minimum rates could

[92] Paras.63-72, applying Arts.3(1) and (8) PWD
[93] 86-88
[94] Paras.93-95, citing Case C-112/00 *Schmidberger*; Case C-36/02 *Omega*, n.19. It underlined also that, pursuant to Art.28 CFR the fundamental right to strike could be subject to restrictions.
[95] Para.98, citing Case 36/74 *Walrave;* Case C-415/93 *Bosman*; Case C-309/99 *Wouters*, n.72
[96] Paras.99-100

not be justified, in practice, because the national system of case-by-case determination made it impossible or excessively difficult for undertakings to determine their obligations.[97]

On the second question, the Court held that Swedish rules discriminated against service providers coming from other Member States where they failed to take into account, irrespective of their content, collective agreements negotiated in other Member States, to which those undertakings are already bound. Such measures treated those companies as akin to national employers who had concluded no collective agreements at all. Since the restriction on Article 56 was discriminatory in nature, the Swedish measures could only be justified by reference to the grounds of public policy, public security and public health contained in Article 52 TFEU. The justifications presented by the Swedish government – creating a climate of fair competition and ensuring that all conditions imposed on employers active on the Swedish market were in line – did not fall within that provision.[98]

The *Laval* decision was confirmed and expanded in the subsequent cases of *Rüffert* and *Commission v Luxembourg.*[99] In *Rüffert,* the Court held that Article 56 TFEU and the PWD precluded German legislation from requiring public authorities to oblige contractors, coming from other Member States, to pay employees at least the remuneration prescribed by collective agreements in force at the place where the contracted services were performed. Those collective agreements could not be viewed as setting the minimum rate of pay for the purposes of the 'core nucleus' of the PWD, since they had not been declared universally applicable, as required by that instrument. Moreover, relying on *Laval,* Article 3(7) PWD could not be relied upon by the host State to impose terms and conditions going beyond that core nucleus. This interpretation was confirmed by the fact that the legal basis for the PWD was Article 56 TFEU. Accordingly, the purpose of the Directive was to facilitate the cross-border provision of services. By requiring service providers from other Member States to pay their workers rates laid down in local collective agreements, the law potentially imposed additional economic burdens that might prohibit, impede or render less attractive the provision of services in the host State. This restriction on Article 56 could not be justified by the objective of worker protection since the requirement only applied to employees working under a public, rather than private, contract of service. It was not clear why this was necessary

[97] Para.101-111
[98] Paras.116-120
[99] Case C-346/06 *Rüffert v Land Niedersachsen* [2008] EU:C:2008:189; Case C-319/06 *Commission v Luxembourg* [2008] EU:C:2008:350

only in relation to the public sector. The same reasoning applied to the argument that the measure was justified for the protection of the organisation of working life by trade unions.

Commission v Luxembourg concerned a Luxembourg rule that required, *inter alia,* that a cost of living index be applied to *all* rates of pay. Although the Court held that this was permissible in relation to minimum rates of pay, on the basis of Article 3(1)(c) PWD, its application to other levels of remuneration did not fall within the 'core nucleus' of that instrument. Luxembourg had argued that its rule was necessary to ensure good labour relations and by the public policy imperative of protecting workers from the effects of inflation, relying on Article 3(10) PWD. The CJEU held that, as a derogation from the fundamental freedom to provide services, Article 3(10) had to be interpreted strictly and could not be determined unilaterally by the Member States. In particular, a public policy derogation needed to reflect 'a genuine and sufficiently serious threat to a fundamental interest of society'.[100] Earlier, it had recalled that for national provisions to be classified as 'public-order legislation' they had to be deemed 'so crucial for the protection of the political, social or economic order in the Member States concerned as to require compliance therewith by all persons present on the national territory'.[101] The Court underlined that Member States had to support their reasons for derogation with 'appropriate evidence or by analysis of the expediency and proportionality of the restrictive measure…and precise evidence enabling its arguments to be substantiated'.[102] Rather than provide such evidence, Luxembourg had merely cited, in a general manner, the objectives of its rules, without demonstrating why they were necessary and suitable for achieving their goal. Accordingly, it could not rely on the public policy derogation in this regard.[103]

2.2.3. A brief overview of debates surrounding the Laval *quartet*

As section one recognised, the *Viking*, *Laval*, *Rüffert*, and *Commission v Luxembourg* judgments provoked a plethora of debate in the academic commentary in diverse fields of legal study. It would be beyond the scope of this work to cover the varied and in-depth avenues of investigation conducted in the wake of these decisions. In short, however, the

[100] Paras.45-50
[101] Para.29, citing Joined Cases C-369/96 and C-376/96 *Arblade a.o.* n.85, para.30
[102] Para.51
[103] Paras.52-55

decisions elicited surprise, in general, that the 'core nucleus' contained in Article 3(1)(a)-(g) imposes a ceiling on host State safeguarding of posted workers, rather than offering a minimum floor of protection.[104] Caused, in part, by the fact the PWD finds its legal basis in Article 56 TFEU, chapter three will consider the indirect contributions that the bestowal of direct effect made to this outcome, specifically in its presentation of Article 56 as 'precise'. The fundamental rights implications of the decision, in *Viking* and *Laval*, to confer horizontal direct effect of Articles 49 and 56 TFEU will also be analysed there.[105] The cases have also sparked discussion about their substantive effects on Member State industrial relations and social models,[106] and revived existing debates about the CJEU's examination of issues falling principally within Member State competence, where they 'fall within the scope of' Union law.[107] Notwithstanding the Court's explicit acknowledgement of the Union's 'social purpose' in *Viking* and *Laval*, the outcome of those cases has also suggested to some that market integration continues to be favoured over social progression in the contemporary Union.[108]

Finally, the cases have reintroduced questions about the Union's relationship with fundamental rights, specifically the issue of whether the pursuit of free movement is prioritised over fundamental rights. Since this thesis seeks to explore the relationship between free movement and fundamental rights, and in light of the breadth of research that this subject could itself stimulate, it is important to acknowledge these debates but also to frame the parameters of our own investigation. The next section performs this essential function.

3. Defining the scope of the analysis: assessing adjudicative structures as a cause of free movement bias

The post-*Viking/Laval* literature on the interaction between free movement and fundamental rights can be roughly divided into two groups. The first category focuses on substantive questions such as whether *Viking* and *Laval* have lowered standards of fundamental rights

[104] For general discussion see C. Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform' in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, (2nd edition, OUP 2011), ch.21, 668; for effects see Currie n.8
[105] See also Dashwood n.12; Wyatt n.31
[106] N.15
[107] For existing debate, M. Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in Alston et al n.61, 449, 471.
[108] For older discussion, see Maduro, ibid. For post-*Viking/Laval* commentary, n.16

protection, in particular regarding the rights of workers,[109] or whether those judgments suggest that the Court distinguishes, in a substantive sense, between different *types* of fundamental rights in its adjudication of clashes between those norms and free movement. In particular, it has been argued that the CJEU is more receptive to Member State rules seeking to protect civil and political fundamental rights than it is to those of an economic and social nature.[110] The second body of the literature, not necessarily mutually exclusive of the first, focuses on the procedural disadvantage that fundamental rights face as a result of the CJEU's breach/justification methodology.[111]

While this section will acknowledge the arguments forwarded in the literature regarding a substantive distinction between different types of fundamental rights, it will, however, emphasise that the subject of our examination is on the adjudicative *process* for resolving tensions between free movement and *all* categories of fundamental rights, since this is where a broader, systemic problem becomes visible. Specifically, the focus will be on the Court's use of the two-stage breach/justification framework to address conflict between free movement and fundamental rights. Since this process structurally subjugates the latter to the former, requiring all fundamental rights to overcome questions of legitimacy, appropriateness, and necessity, the two-stage approach remains problematic. This burden of proof places the exercise or protection of fundamental rights at a visible disadvantage procedurally. Even in those cases where fundamental rights prevail, this is *despite* not because of the Court's processing of rules aimed at their protection. Providing a broad overview, to be developed in chapters two, three, and four, the section will not only demonstrate the existence of the two-stage model but also outline the historical reasons for its use. It will argue that, viewed against the background of the EU's economic origins, an adjudicative architecture that gives precedence to free movement over competing interests is understandable. However, when retained for clashes between free movement and fundamental rights, this imbalanced framework treats free movement as *more* fundamental, even than fundamental rights. This lays the groundwork for section four to establish why this model is ill-suited to resolving this type of conflict.

[109] Currie, n.8
[110] R. O'Gorman, 'The ECHR, the EU and the weakness of social protection at the European level' (2011) 12(10) GLJ 1833
[111] Barnard, n.17; Trstenjak, Beysen, n.10

3.1. Substantive differentiation: the impact of types of fundamental rights on the outcome of free movement/fundamental rights conflict

Those investigating the substantive fundamental rights impact of the *Laval* quartet have examined whether those cases have led to a lowering in fundamental rights protection, especially in relation to the posting of workers.[112] Nevertheless, while the judgments have provoked criticism that the free movement provisions are favoured over fundamental rights, there are case-law examples of the latter prevailing over the former. There is also, therefore, an argument in the literature that this demonstrates a substantive distinction, from the Court, between civil and political rights, on the one hand, and economic and social rights, on the other, where these different types of rights clash with free movement. Accordingly, it is worth examining the cases of *Schmidberger*, *Omega*,[113] and *Dynamic Medien*[114] and the comparisons drawn between them and *Viking* and *Laval*.

First, in *Schmidberger*, the Court was tasked with reconciling the free movement of goods with the freedoms of expression and association, protected by Articles 10 and 11 ECHR. A group of environmental protestors conducted, with the permission of the Austrian authorities, a demonstration on the Brenner motorway. This resulted in the closure of a main route between Austria and Italy for almost 30 hours. Schmidberger, an international transport undertaking that used the motorway to transport goods between Member States, brought an action for damages against the Austrian state on the basis that the latter's failure to ban the protest constituted a restriction of Article 34 TFEU, on the free movement of goods. Austria contended that assessment of competing interests should lean in favour of the freedoms of expression and assembly (in this case of the protesters), since they were fundamental rights, inviolable in a democratic society.

The Court held that, as a 'fundamental principle of the Union',[115] Article 34 not only prohibits measures emanating from the Member State itself, but also situations in which the Member State fails to take adequate measures in respect of obstacles to the free movement of goods, caused by private individuals.[116] Consequently, the decision not to ban a protest, which

[112] Currie, n.8
[113] Case C-112/00 *Schmidberger*; Case C-36/02 *Omega*, n.19
[114] Case C-244/06 *Dynamic Medien*, n.22
[115] Para.51
[116] Para.57-58, citing Case C-265/95 *Spanish Strawberries*, n.81

resulted in the temporary closure of a major transit route for the cross-border movement of goods, constituted a restriction on Article 34 that was, in principle, incompatible with Union law.[117]

As to whether this restriction could be justified, the Court acknowledged that the Austrian decision to permit the ban related to the protection of the fundamental rights to freedom of expression and assembly, pursuant to Articles 10 and 11 ECHR. It accepted that fundamental rights form an integral part of the general principles of Union law and indeed stated that measures incompatible with the observance of human rights were not acceptable in the Union.[118] Accordingly, the protection of fundamental rights was a 'legitimate interest which, in principle, justifies a restriction…even [of] a fundamental freedom guaranteed by the Treaty'.[119] However, it also noted that the fundamental rights to freedom of expression and assembly were not absolute. The second paragraphs of Articles 10 and 11 ECHR permit derogations from those rights where they operate in the public interest, are in accordance with the law, are motivated by a legitimate aim, and are necessary in a democratic society. Accordingly, the Court concluded, the free movement of goods and the freedoms of expression and assembly had to be weighed, having regard to all of the circumstances of the case, in order to determine whether a fair balance was struck between those interests.[120] Although the national authorities had a wide margin of discretion in this regard, it was nevertheless, necessary to examine whether the restrictions placed on intra-Union trade were proportionate in light of the need to protect fundamental rights.[121] The Court noted that the protest, the purpose of which was to highlight environmental concerns rather than to restrict cross-border movement, had taken place on a single route on one occasion, and that various administrative measures had been taken to minimise disruption. Within their wide margin of discretion, the national authorities were entitled to conclude that an outright prohibition of, or stricter conditions on, the demonstration would have constituted an unacceptable or excessive interference with the Article 10 and 11 ECHR rights of the protestors. The inconvenience, as regards free movement, could be tolerated provided that it related to the lawful demonstration of opinion.[122]

[117] Para.62-64
[118] Paras.69-73
[119] Para.74
[120] Paras.80-81
[121] Para.82
[122] Paras.89-91

Omega concerned a decision, by German authorities, to ban a laser game in which participants fired at human targets. Omega, the company behind the game, argued that the ban contravened Article 56 TFEU on the free provision of services, since Omega operated as a franchisee of a British undertaking. However, the German courts concluded that, since the game involved 'playing at killing', it constituted an affront to human dignity, protected by the German constitution, by awakening or strengthening an attitude of denying the fundamental rights of a person. Accordingly, a reference was made to the CJEU, in the course of which, the referring court also posited that if human dignity constituted a fundamental right within the Union legal order, there would be no need to assess the proportionality of the ban against the restrictions it placed on the free provision of services.

Having established that the prohibition was a *prima facie* breach of Article 56,[123] the CJEU accepted that the restriction could be justified, *in principle*, since the protection of human dignity fell within the public policy derogation contained in Article 52(1) TFEU. However, as 'a derogation from the fundamental principle of the freedom to provide services, [public policy had to be] interpreted strictly [and] its scope [could not] be determined unilaterally by each Member State'.[124] Nevertheless, in specific circumstances, public policy may vary from one country to another and from one era to another. Accordingly, the Member States enjoyed a margin of discretion in this regard, within the limits imposed by the Treaty.[125] The Court recalled that fundamental rights formed an integral part of the general principles of Union law, which were drawn, *inter alia*, from the constitutional traditions of the Member States. It underlined that the Union legal order 'undeniably strives to ensure respect for human dignity as a general principle of law', irrespective of its 'particular' status as a fundamental right in Germany.[126] The CJEU reiterated that fundamental rights constituted a legitimate interest that, in principle, justifies a restriction even on the fundamental freedom to provide services.[127] In order to be justifiable, in *practice*, however, national measures were required to demonstrate that they were necessary for the protection of human dignity, and could not be attained by measures less restrictive of free movement.[128] This was, however, not to be determined by the fact that one Member State had chosen a system of protection different from that adopted in

[123] Para.25
[124] Para.30
[125] Para.31
[126] Paras.33-34
[127] Para.35
[128] Para.36

another.[129] The Court noted that the German ban corresponded to a level of protection of human dignity sought by the German constitution. Moreover, since laser games were only prohibited where they involved firing at human targets, the ban did not go beyond what was necessary to achieve its aim. The restriction on the free provision of services was justified.[130]

In *Dynamic Medien*, an undertaking, Dynamic Medien, brought an action before the German courts with a view to prohibiting its competitor, Avides, from selling in Germany, via mail order, videos and DVDs, contrary to the Jugendschutzgesetz. That law required assessment of the media in Germany and the labelling of the videos/DVDs with an age-label corresponding to the decision of the competent German authorities. Avides argued that, since it imported its videos/DVDs from the UK, where their content had already been assessed by the British Board of Film Classification, application of the German rule would violate Article 34 TFEU on the free movement of goods. The Court held that the German rules constituted a restriction of Article 34. Imported media was subjected to checks regardless of whether a similar procedure had been conducted in the Member State of production, and to a change in product labelling. This was liable to make the importation of DVDs into Germany more difficult and more expensive and could dissuade undertakings from marketing their goods there.[131]

On the question of justification, the CJEU accepted that the German measures sought to protect the rights of the child,[132] in particular to safeguard children from material injurious to her/his well-being,[133] which, in principle, justified restrictions on the free movement of goods. Nevertheless, it was necessary to consider if Germany pursued its goal in a proportionate manner. Echoing *Omega*, the Court stated that domestic provisions did not have to correspond to a conception of child protection shared across the Member States. This could vary between Member States on the basis of moral and cultural views. Although the Member States enjoyed a broad margin of discretion in this respect, this still had to be exercised in compliance with Union law. This required consideration of the suitability and necessity of the German measures. For the Court, there was 'no doubt' as to the suitability of the German rule. Further,

[129] Paras.37-38, citing, *inter alia*, Case C-124/97 *Läärä a.o. v Finnish State* [1999] EU:C:1999:435; Case C-67/98 *Questore di Verona v Zenatti* [1999] EU:C:1999:514
[130] Paras.39-40
[131] Paras.24-35
[132] Recognised as a result of international law, namely the International Covenant on Civil and Political Rights, (adopted 16 December 1966, entering into force 23 March 1976) 999 UNTS 171, and the United Nations Convention on the Rights of the Child (UNCRC) 1989 Treaty Series, vol. 1577, 3, via the general principles of EU law, citing Case C-540/03 *Parliament v Council* [2006] EU:C:2006:429, para.37, and Art.24 CFR
[133] Art.17 UNCRC, ibid

the prohibition on sales of media that had not been subject to examination, classification, and labelling by the competent German authorities, only applied in respect of children and not to the import of DVDs for adults. Accordingly, the rules did not go beyond what was necessary to secure the Member State's desired goal. The proportionality of a measure had to be assessed solely by reference to the objective pursued and the level of protection intended by the Member State, and not through comparisons with the systems of protection implemented elsewhere. The only requirement was that the national examination was readily accessible, could be completed in a reasonable time, and that the decisions of the competent authorities could be appealed. This was left to be determined by the national court.[134]

Consequently, in contrast to *Viking* and *Laval*, *Schmidberger*, *Omega*, and *Dynamic Medien* all serve as examples of conflict between free movement and fundamental rights in which the latter has prevailed. This has led some commentators to argue that the Court is more likely to decide that the restrictions fundamental rights impose on free movement are justified where they are civil and political in nature, as opposed to economic and social. For instance, focusing on the pre-Lisbon era, O'Gorman argues that the absence of fundamental rights provision within the Union's formative texts, and the Court's subsequent reliance on the ECHR, which is civil and political in nature, as a 'special source of inspiration' led to the neglect of social rights within the EU legal order. This was cemented, he argued, within the EU Treaty when Article 6 TEU made reference to the ECHR after Maastricht.[135] He claims that, although a significant number of Member States protect social rights within their constitutions, the CJEU has never attempted to use these as a basis for the discovery of a common constitutional tradition for the purposes of the general principles of EU law. He remarks that international sources have fared little better, with the exception of the use of the European Social Charter in *Defrenne II* to enshrine the prohibition of discrimination on grounds of sex.[136] Applying this to *Laval*, O'Gorman argues that, although the Court recognised the right to strike as fundamental earlier in its judgment, at the crucial stage of its reasoning, in which it assessed the proportionality of the trade unions' activities, it looked solely to the provisions of the Treaty, namely ex-Articles 2 and 3 TEC, which gave the EU a social purpose. In contrast with *Schmidberger* and *Omega*, it did not reference the need to respect *fundamental rights*, required by Article 6 TEU, at this point, since that provision

[134] Paras.42-52
[135] O'Gorman, n.110, 1838-1843
[136] Ibid, 1836; Case 149/77 *Defrenne II* [1978] EU:C:1978:130, paras.26-28. On use of the UNCRC, see Drywood, n.68

focuses on the ECHR and, implicitly, rights of a civil and political nature. He concludes that it is this that leaves fundamental social rights inadequately protected.[137]

This argument is also perhaps implicit in the analysis of Trstenjak and Beysen, who note that in *Schmidberger*, the protection of the fundamental rights of freedom of expression and freedom of assembly was sufficient, on its own, to constitute a justification, in principle, for restrictions placed on the free movement of goods. By contrast, in *Viking* and *Laval*, exercise of the fundamental right to strike was not sufficient in itself to justify, in principle, restrictions on the freedom of establishment and the free provision of services. It was necessary, also, that the purpose of the strike served an overriding reason in the public interest, namely the protection of workers.[138] For Trstenjak and Beysen, the latter approach 'sits uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms'.[139]

Commentators have also compared the wide margin of discretion afforded to the Member States in the *Omega* and *Dynamic Medien* judgments, with the Court's prescriptive guidance in *Viking* and its application of the law in *Laval*. As Barnard highlights, in the latter cases, 'the Court…made it extremely difficult to defend the social interests due to its strict approach to justification and proportionality… despite recognition of the right to strike.'[140] Meanwhile, Chu remarks, that in *Omega,* '[i]t suffices merely that the German authorities felt that a ban was necessary to achieve the level of protection of 'human dignity' that its [own] constitution seeks to guarantee…by this reasoning, the [CJEU] renders the whole attempt at applying the 'proportionality' principle…somewhat meaningless'.[141] Moreover, as Malmberg and Sigeman point out, the Court was prepared to allow for national differences in approaches to human dignity in *Omega* but did not display the same willingness with respect to industrial relations models in *Viking* and *Laval*. They venture that 'these differences give the impression of the [CJEU] being more inclined to give preference to…fundamental rights which are based on moral and ethical considerations or on essential elements of the democratic system than to

[137] O'Gorman, n.110, 1838-1843. The primary law status of the Charter, post-Lisbon might change this since that instrument makes reference to fundamental social rights, though it remains unclear which are 'rights' and which are lesser 'principles' under the Charter.
[138] N.10. C.f. Brown, n.21, 1504-1505, who argues that the fundamental right to freedom of expression warrants greater protection, for instance, where it is political rather than commercial in nature. Ch.4 argues that the Court's consideration of 'aim' in *Viking* and *Laval* is attributable to the application of Art.56 TFEU to private parties.
[139] N.10, 313
[140] N.17, 264
[141] G. Chu, ''Playing at Killing' Freedom of Movement', (2006) 33(1) LIEI 85, 94

such rights which are based on…economic considerations'.[142] This claim is certainly supported by the Court's reference to variation in moral and cultural views in *Dynamic Medien*.[143]

These debates demonstrate that the mere existence of cases in which fundamental rights prevail over free movement is insufficient to support an assertion that the relationship between those two norms is entirely unproblematic. Indeed, this thesis does not concern itself with a quantitative assessment of the free movement/fundamental rights case-law. Even a finding that fundamental rights 'triumph'[144] over free movement in the majority of cases would not provide an adequately comprehensive picture of the significant qualitative impact that the Court's approach might have on fundamental rights protection in those cases where free movement prevails. These consequences are explored, from practical, theoretical, and constitutional perspectives in section four. However, it will be emphasised in the next subsection that these issues broadly arise from the *structure* of the Court's decision-making. In all of the Court's case-law concerning interaction between free movement and fundamental rights discussed thus far, including those in which fundamental rights are favoured in the final analysis, the Court has processed disputes through a two-stage framework. At stage one, a restriction on free movement, by the exercise or protection of a fundamental right, is established. At stage two, the restrictive activity must 'defend' itself against this *prima facie* breach of Union law. The disparity in burdens of proof between these stages places the exercise or protection of fundamental rights at a distinct procedural disadvantage. While cases such as *Schmidberger*, *Omega*, and *Dynamic Medien* might demonstrate some flexibility in the Court's application of this model, this is *in spite of* its requirements.[145] These issues will be unpacked further throughout the thesis. The rest of this section is concerned with explaining the Court's adjudicative methodology, providing an historical explanation for its use, and confirming the retention of a two-stage framework in the fundamental rights context.

[142] J. Malmberg, T. Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice', (2008) 45 CMLRev 1115, 1130
[143] See also Cases C-124/97 *Läärä* and C-67/98 *Zenatti*, n.129
[144] This would, of itself, be difficult to define.
[145] Accordingly, the Court's approach would also be open to criticism for a lack of coherence. See N. Nic Shuibhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 CMLRev 965

3.2. Suffering from an historic hangover: retaining a pre-existing structural preference for free movement in interactions with fundamental rights

3.2.1. The fundamental role of free movement in the creation of a common market

In contrast with the Union's incremental approach to fundamental rights protection, ever since its inception, the creation of the common market has been a central task of the EU. Indeed, it was the primary objective of the Union's predecessor, the European Economic Community.[146] Further, the free movement of goods, services/establishment, workers, and capital across intra-EU borders is consistently recognised as critical to the functioning of a common market. Part Two of the Rome Treaty, entitled 'Foundations of the Community', was concerned, *inter alia*, with the elimination of obstacles to these four freedoms.[147] Pursuant to Article 26 TFEU, 'the Union shall adopt measures with the aim of establishing and ensuring the functioning of the internal market…'. Article 34 TFEU imposes a prohibition on all quantitative restrictions on imports and measures having equivalent effect between Member States.[148] Freedom of movement for workers 'shall be secured' within the Union by virtue of Article 45 TFEU, which requires the abolition of any discrimination based on nationality between workers in relation to employment, remuneration and other conditions of work and employment. Restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited by Article 49 TFEU, while Article 56 TFEU extends this to the cross-border provision of services. Article 63 forbids all restrictions on the free movement of capital, including between Member States and third countries.[149] The Union also enjoys shared legislative competence in relation to the internal market.[150]

At the judicial level, the CJEU explicitly recognised the fundamental role of free movement in the attainment of a common market in its early case-law. For example, in *Sterling Drug*, the Court referred to the free movement of goods as a 'fundamental principle of the common

[146] See Art.2 EEC; Art.3(3) TEU (post-TL); Part Three, Title I of the TFEU, particularly Art.26
[147] Title I (goods), particularly ch.2 on the elimination of quantitative restrictions between Member States and Art.30 TR. Title III , chs.1, 2, 3, and 4 concerned workers (Art.48), establishment (Arts.52 and 53), services (Art.59) and capital (Art.67) respectively. Post-Lisbon, the market freedoms are contained within Part Three, Title I TFEU
[148] Art.35 TFEU makes similar provision for exports.
[149] This is the result of the significant broadening of the free movement of capital by the Maastricht Treaty
[150] Art.46 TFEU (workers); Arts.50, 52(1) and 59 TFEU (establishment and services); Art.64 (capital); Arts.114 and 115 TFEU (general legislative competence for measures concerning the establishment or functioning of the internal market). The Union shares legislative competence for the internal market with the Member States (Art.3 TFEU).

market'.[151] This language is also present in the Court's case-law on the other market freedoms.[152] Reflecting the EEC's primary purpose, the 'fundamentality' of free movement was soon generalised such that the free movement provisions were presented as 'fundamental principles of the Community'.[153] Given the Rome Treaty's focus on economic integration, this generalisation within the language of the Court is unsurprising. It simply removes the 'middle man'. Free movement is essential to the achievement of a common market. This was the central aim of the EEC. Therefore, free movement was fundamental to the EEC as a whole.

And yet, this generalisation of free movement from 'fundamental principle of the common market' to a 'fundamental principle of the Treaty' had the potential subtly to alter the perception of its role, transforming it into an independent 'something', fundamental in and of itself. In other words, this terminological change indirectly contributes to the reconceptualisation of free movement from a means to an end; to a separate objective. Against this backdrop, we begin to see free movement labelled a 'fundamental freedom'.[154] Within the confines of the EEC's constitutional framework, with its focus on economic integration, this linguistic treatment conceptualises free movement as something akin to a fundamental right. This is especially true when we consider that the identification of the direct effect of the free movement provisions associated them with individual rights.[155] Indeed, in *ABDHU*, the free movement of goods was placed on the same normative plain as fundamental rights.[156] In *Grogan*, Advocate General Van Gerven went as far as to explicitly define the conflict between the freedom to provide services and the fundamental right to life as one between two fundamental rights.[157] As chapter four will explore in more detail, later in the Union's development, the utilisation by Union citizenship of free movement as the core right of the Union citizen, also resulted in the terminological presentation of free movement as a

[151] Case 15/74 *Centrafarm BV a.o. v Sterling Drug* [1974] EU:C:1974:114, para.8; Case 87/75 *Bresciani v Amministrazione delle finanze dello Stato* [1976] EU:C:1976:18
[152] Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] EU:C:1974:13, para.4, Case 41/74 *van Duyn v Home Office* [1974] EU:C:1974:133, para.13 (workers); Case 2/74 *Reyners v Belgian State* [1974] EU:C:1974:68, para.43, Case 11/77 *Patrick v Ministre des affaires culturelles* [1977] EU:C:1977:113, para.9 (establishment); Case 36/74 *Walrave*, n.72, para.18, Joined Cases C-51/96 and C-191/97 *Deliège*, n.66 (services); Case C-302/97 *Konle v Austria* [1999] EU:C:1999:271, para.38; Case 7/78 *R v Thompson a.o.* [1978] EU:C:1978:209, para.22 (capital)
[153] Case 216/84 *Commission v France* [1988] EU:C:1988:81, para.19; Case C-265/95 *Spanish Strawberries* n.81, paras.24 and 32; Case C-319/06 *Commission v Luxembourg* n.99
[154] Case C-379/92 *Matteo Peralta* [1994] EU:C:1994:296, para.7; Case 112/00 *Schmidberger*, n.19, para.62
[155] Discussed in ch.3.
[156] Case 240/83 *Procureur de la République v ADBHU* [1985] EU:C:1985:59
[157] Via the freedom of expression. Case C-159/90 *SPUC v Grogan a.o.* [1991] EU:C:1991:378, para.34

fundamental right and to its conceptualisation as something *more* than a tool for the achievement of an internal market.

The centrality of free movement to the EEC's primary aims was not only reflected in the Court's language but also in the structure of its decision-making. The two-stage approach it adopted to adjudicate clashes between free movement and competing public interests can be likened to that used by the ECtHR when determining conflicts between *fundamental rights* and public interests, further indicating the fundamentality of free movement within the EU legal order. The following subsection will examine this phenomenon in more detail and argue that the suitability of this model was contingent upon the limited goals of the EEC and the narrow scope of the free movement provisions, since free movement was unlikely to interact with fundamental rights in that context.

3.2.2. The structural elevation of free movement to a fundamental right: introducing procedural bias through a two-stage model

Where fundamental rights, under the ECHR, clash with public interests, the ECtHR case-law demonstrates that procedural priority is generally given to the former in accordance with the terms of the Convention right in question.[158] Greer asserts that this prioritisation is an eventuality inherent in the structure of ECHR provisions themselves.[159] For instance, Article 10(1) ECHR bestows the fundamental right to freedom of expression while it is *subsequent* Article 10(2) that provides that public interests might limit this right. This textual architecture prescribes a two-stage approach,[160] to determining whether a Convention right has been violated. It requires, first, the establishment of an interference with the relevant right; and asks, second, whether such interference is justified. The consideration of public interests as a 'defence' against *prima facie* violations of the Convention affords evidential priority to the fundamental right. Thus, for a public interest interference with Article 10 to prevail it must overcome the justificatory hurdles imposed by Article 10(2). It must be 'prescribed by law', be 'necessary in a democratic society' to pursue one of the public interests contained in that

[158] *Kudla v Poland* App.no:30210/96, concerning Art.5 ECHR (right to liberty and security); *Rowe and Daniels v UK* App.no:28901/95, concerning Art.6 ECHR (right to a fair trial). See also S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, (CUP, 2006) 208. For substantive explanations in relation to each Convention right, 209-210.
[159] Ibid
[160] See n.158

provision,[161] and must do so proportionately. Consequently, Greer concludes that '[Convention] rights and public interests are not prima facie equal variables to be weighed in a balance. The scales are loaded, but not conclusively, in favour of rights'.[162]

The CJEU utilises a similar procedural approach for clashes between the *free movement provisions* and public interests. The case-law contains numerous examples of that Court operating a two-stage breach/justification model, asking, first, whether there has been a restriction of the relevant free movement provision(s), and second, if this breach can be justified. For instance, in *Commission v Italy*,[163] concerning an Italian rule which made advance payment of goods intended for import subject to the provision of a guarantee, the Court considered, first, whether the domestic measure restricted Article 34 TFEU on the free movement of goods. Once this was established, the Italian state was required to justify this by reference to the permissible derogations from that freedom contained in Article 36 TFEU.[164]

The presentation of public interests as a 'defence' to initial breaches of free movement has practical consequences for their realisation. Public interests must clear significant justificatory hurdles in order to overcome their *prima facie* unlawful conduct. Thus, restrictions on free movement, caused by discriminatory activity, can only be justified where the measure is necessary to meet a real threat to the public good in question,[165] where the discrimination in question is not arbitrary,[166] where the measure is effective in meeting the aim pursued,[167] and finally where the measure is suitable as the least restrictive option available.[168] Moreover, as derogations from the 'fundamental principle' of freedom of movement, potential justifications must be interpreted 'strictly'.[169] The *Gebhard* case demonstrates the application of similar evidentiary obstacles to non-discriminatory restrictions on free movement. They must constitute an imperative requirement in the general interest; be suitable for attaining the

[161] E.g. in the interests of national security, the protection of public health, or the prevention of crime.
[162] N.158
[163] Case 95/81 *Commission v Italy* [1982] EU:C:1982:216
[164] See also, e.g. Case C-4/75 *Rewe Zentralefinanz*, n.19; Case 5/77 *Tedeschi*, n.27
[165] Joined Cases 115/81 and 116/81 *Adoui and Cornuaille v Belgian State* [1982] EU:C:1982:183; Case C-192/01 *Commission v Denmark* [2003] EU:C:2003:492
[166] Case 4/75 *Rewe-Zentralfinanz*, n.19; Case C-324/93 *R v SSHD, ex p. Evans Medical and Macfarlan Smith* [1995] EU:C:1995:84
[167] Case C-217/99 *Commission v Belgium* [2000] EU:C:2000:638; Case C-55/99 *Commission v France* [2000] EU:C:2000:693
[168] Case 104/75 *De Peijper* [1976] EU:C:1976:67; Case C-67/97 *Bluhme* [1998] EU:C:1998:584
[169] E.g. Case C-141/07 *Commission v Germany* [2008] EU:C:2008:492; Case 13/68 *Salgoil* [1968] EU:C:1968:54. Ch.3 argues that one reason for this restrictive approach lies in the conferral of direct effect upon the free movement provisions.

objective pursued; and not go beyond what was necessary to achieve it.[170] These requirements are comparable to the hurdles, detailed above, faced by those wishing to justify an interference with a Convention right. Furthermore, it is inherent in the very wording of 'imperative',[171] 'mandatory'[172] 'and 'overriding'[173] requirements that justifications must *overcome* any breach of free movement rather than be balanced against it, connoting a procedural disadvantage for public interests.

In terms of burden of proof, it could be argued that since an initial restriction of free movement must always be established at stage one, before issues of justification even arise, the two-stage approach does not operate to favour free movement over public interests. However, as subsequent chapters will detail, there is a significant evidentiary gap between establishing a restriction and demonstrating that it is justified. As the discussion of *Omega* detailed, as 'fundamental principles' of the Union, the market freedoms must be interpreted broadly, derogations from them 'strictly'.[174] In practice, this introduces different standards of proof. For instance, trading rules 'capable of hindering, directly or indirectly, actually or potentially' intra-Union trade'[175] can constitute a breach of the free movement of goods. By contrast, those wishing to establish a justification for such a restriction face the much more significant evidentiary hurdles outlined above.[176]

In summary, the Court's two-stage approach to conflict between free movement and public interests places the latter on the procedural back-foot. Greer's claims about the ECtHR's methodology are directly transferable into this new setting. Free movement and public interest are not equal variables. The scales are loaded in favour of free movement, although this will not always result in the 'trumping' of public interests by the free movement provisions.[177] The similarity between the methodologies of the ECtHR and the CJEU suggest that, from a structural point of view, free movement is treated as the equivalent of a fundamental right, in the Union legal order. It is worthy of greater prioritisation than 'mere' public interests. As a

[170] Case C-55/94 *Gebhard* n.84
[171] Ibid
[172] Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon),* n.30
[173] Case C-298/99 *Commission v Italy* [2002] EU:C:2002:194, para.38
[174] Case 36/02 *Omega,* n.19, para.30
[175] Case 8/74, *Procureur du Roi v Dassonville* [1974] EU:C:1974:82, para.5
[176] Although it is accepted that Court will vary how strictly it applies these conditions. See, recently, the Court's judgments in the 'pharmacies case-law': Joined Cases C-171/07 *Apothekerkammer des Saarlandes a.o.* and C-172/07 *Helga Neumann-Seiwert v Saarland and Ministerium für Justiz, Gesundheit und Soziales* [2009] EU:C:2009:316, paras.19, 30-39; Case C-531/06 *Commission v Italy* [2009] EU:C:2009:315, para.36, 54-63.
[177] E.g. Case 5/77 *Tedeschi,* n.27

brief aside, this allows a definitional point to be made. The thesis will use the term 'breach' in the broad sense of covering restrictions on free movement established at stage one of the two-stage process. Although wider than the common terminology of the Court – which generally uses the term 'breach' following its final assessment of both stages – our definitional approach emphasises that the structure of the Court's adjudicative framework presents activity that restricts free movement as *prima facie* unlawful unless and until it can overcome the (generally) substantial hurdles associated with justification.

However, within the confines of the original aims and scope of the EEC Treaty this is both understandable and (largely) unproblematic. As the Member States had come together with the primary objective of creating a common market, it is unsurprising that this goal would be prioritised within the EEC's legal framework. Activity undermining the core aim of the EEC arguably *should* be presented as *prima facie* unlawful in such a context. For instance, the presumption, inherent to the two-stage approach, that protectionist Member State policy is 'manifestly wrongful' facilitates the elimination of barriers to trade, a vital task of the EEC. Crucially, for our purposes, the use of protectionist policy, by a Member State, for fundamental rights reasons would be rare. Accordingly, it is unlikely that fundamental rights protection would be undermined by a two-stage model. One potential example is where collective action by trade unions, recognised as fundamental by Article 11 ECHR and Article 28 CFR, is targeted at protecting national workers on the job market, as was the case with the British Jobs for British Workers campaign at the Lindsey Oil Refinery.[178] However, in order for this fundamental right to trigger the market freedoms of service providers coming from other Member States, Article 56 TFEU would have to be directly effective against trade unions. The free movement provisions were not horizontally, or even vertically, directly effective immediately after the entry into force of the Rome Treaty. This shows the twin influences of the expansion in the material and personal scope of the free movement provisions, and the conferral of direct effect upon them, on their interaction with fundamental rights. Only after such constitutional developments does the CJEU's two-stage approach becomes potentially problematic. Chapters two and three examine these evolutions in more detail.

[178] See http://news.bbc.co.uk/1/hi/uk/7859968.stm Reported 30 January 2009, accessed on 13 May 2013

First, however, it is necessary to demonstrate the retention of the two-stage model after free movement came into increased contact with fundamental rights and to consider, in the abstract, the potential consequences of this for fundamental rights protection. The following subsection will confirm this phenomenon and argue that this reduces fundamental rights, at this procedural level, to the equivalent of a public interest, in this context, introducing a presumption of illegality to the protection of fundamental rights.

3.2.3. More fundamental than fundamental rights: the retention of a two-stage model for clashes between free movement and fundamental rights

The descriptions of *Schmidberger, Omega, Viking, Laval,* and *Dynamic Medien* above, provide the necessary evidence that, despite the confines of the EEC's original framework, free movement has evolved in a way that brings it into more frequent contact with fundamental rights.[179] Here, we will reflect on how the Court structured its adjudication of tensions between these two norms. Perhaps because fundamental rights protection was not initially perceived as relevant to the EEC, the provisions permitting derogations from free movement contained no reference to fundamental rights. This remains the case today.[180] This led to disagreement in the literature, following the nascent interactions between free movement and fundamental rights, about where fundamental rights feature in the adjudicative process. Brown and Perišin consider that they are a 'floating' justification that cannot be slotted into the existing derogating provisions. Brown nevertheless reflects that this new justificatory option is still subject to the same questions of proportionality.[181] Barnard speculates that fundamental rights are a free-standing justification or a mandatory requirement, but one that has higher status than the others.[182] Gonzales posits that fundamental rights, having primacy over Treaty freedoms, are neither mandatory requirements nor floating justifications.[183] Spaventa argues fundamental rights have been

[179] See also Case C-368/95 *Familiapress,* n.19
[180] Arts.36, 45(3), 52(1) and 65 TFEU
[181] Brown, n.21, 1504 ; T. Perišin, 'Interaction of fundamental (human) rights and fundamental (market) freedoms in the EU' (2006) 2 CYELP 85
[182] C. Barnard, *The Substantive Law of the EU: The Four Freedoms,* (OUP, 2004), 109
[183] G. Gonzales, 'EC Fundamental Freedoms v Human Rights in the Case C-112/00 Schmidberger…' (2004) 31(3) LIEI 219, 223

reduced to a public interest, which suggests they could be slotted into the public policy category.[184]

It is submitted here that, through the retention of a two-stage approach, fundamental rights constitute either a 'public policy' exception or a 'floating justification'. An examination of the case-law, detailed above, demonstrates the maintenance of that model where free movement conflicts with fundamental rights. As Brown highlights, although the Court identified a fundamental rights issue in *Schmidberger*, 'it immediately swings back to classic Luxembourg-style jurisprudence: free movement is the guiding principle, but there may be exceptions to it – providing, of course, that the restrictions are proportionate and necessary'.[185] Specifically, the Court concluded, first, that there had been a breach of free movement and only examined second whether this could be justified in the name of fundamental rights. Fundamental rights were defined as a 'legitimate *interest* which, *in principle,* justifies a restriction…*even* [of] a fundamental freedom guaranteed by the Treaty [emphasis added]'.[186] Despite the wide margin of appreciation the Member States enjoyed in this regard, the CJEU still proceeded to assess the proportionality of Austria's fundamental rights protection against its effects on the free movement of goods. In *Omega* and *Dynamic Medien*, the Court also adopted this same two-stage approach, emphasising the need to consider whether Germany's aims could be achieved by measures less restrictive of free movement. In *Omega*, this implicitly rejected the suggestion of the referring court that, as a fundamental right, human dignity would not be exposed to a proportionality assessment.[187] The 'triumph' of fundamental rights in those cases was the result of a 'light-touch' application of the proportionality principle; an examination that was still more rigorous than the Court's cursory consideration of restrictions to free movement. Crucially, in *Viking* and *Laval*, the Court's adoption of a two-stage methodology exposed the fundamental right to strike to extremely high justificatory hurdles. The exercise of that fundamental right could only be justified in practice, in *Viking* if jobs were 'jeopardised or under serious threat'. Even then strike action was only warranted if measures less restrictive of free movement were unavailable. In *Laval*, the ceiling of protection offered by the PWD precluded altogether the

[184] E. Spaventa 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009), though she does not agree that this is how fundamental rights *should* be presented. See 359-363 for her own proposals in this regard
[185] Brown, n.21, 1507
[186] Case C-112/00 *Schmidberger*, n.19, para.74
[187] Case C-36/02 *Omega*, n.19, para.36

use of the fundamental right to strike as a 'defence' against a *prima facie* breach of the free provision of services.

This analysis cannot support Gonzales' argument that fundamental rights enjoy primacy over the Treaty freedoms. Nor can Barnard's claim, that fundamental rights are a free-standing justification of higher status than mandatory requirements, really be sustained. Fundamental rights are processed through exactly the same adjudicative mechanisms as other public interests. Accordingly, it is argued here that, in the context of their interactions with free movement, fundamental rights are treated either as 'floating justifications' exposed to the Court's standard proportionality principle or as 'public policies' within the Treaty derogations. Free movement is, consequently, elevated *beyond* fundamental rights status and/or fundamental rights are relegated to 'mere' public interests by the structure of the Court's decision-making.[188] As the Court's reasoning in *Schmidberger* demonstrates, this inverts the methodology of the ECtHR, requiring fundamental rights to defend themselves against breaches of free movement, and replacing the structural prioritisation of fundamental rights with a procedural preference for free movement.[189]

In setting the parameters of the analysis, this section has acknowledged that there are both substantive and structural issues arising from the case-law on the interaction between free movement and fundamental rights. Indeed, a comparison of the outcomes of *Schmidberger*, *Omega*, and *Dynamic Medien* against the decisions in *Viking* and *Laval* might suggest that the Court alters its approach depending on the *type* of fundamental right involved. However, the section has also demonstrated the retention of a two-stage approach, originally used in the context of clashes between free movement and public interests, for addressing conflict between free movement and fundamental rights, regardless of the type of right involved. This treats free movement as *more* fundamental than fundamental rights, reducing the latter to the level of a public interest. This invites a more detailed consideration of the effects of free movement on fundamental rights protection. For instance, what are the consequences of structurally relegating fundamental rights to a 'public interest' in this context? It is to this issue that we now turn.

[188] See also Spaventa, n.184
[189] Paras.80-81

4. Exploring the consequences of an imbalanced adjudicative framework from practical, theoretical and constitutional perspectives

This section will assess the effects of the two-stage breach/justification approach from practical, theoretical, and Union constitutional perspectives. It will examine, first, what potential fundamental rights outcomes the two-stage approach produces and acknowledge that the breach/justification framework can benefit fundamental rights outwith instances of clash. It will nevertheless outline arguments, developed in chapters two, three, and four that by assessing the proportionality of fundamental rights according to the restrictions they place on free movement, the two-stage model can result in a general lowering of fundamental rights standards. The section will ask, second, whether exposing fundamental rights to proportionality assessment is problematic from first principles. This also introduces questions of whether and why fundamental rights merit special protection as compared with 'mere' public interests. The section will draw on theoretical justifications for the generally superior hierarchical position of fundamental rights but will ultimately rely on the fact that the Union has chosen, through the agreement of its Member States, to offer distinct safeguards to fundamental rights. This invites, finally, a broader review of the suitability of the two-stage approach against the Union's contemporary constitutional framework. The section will argue that the prioritisation of free movement over fundamental rights is outmoded when assessed against the Union's explicit commitment to respecting fundamental rights, its new, broader, non-economic aims, and the way in which the Treaty envisages their realisation. In particular, the current adjudicative model does not leave the Member States with sufficient legal space to pursue the contemporary Union objectives with which the Treaty tasks them.

4.1. What fundamental rights outcomes does a 'priority to free movement' approach produce?

The general expansion of interactions between free movement and fundamental rights is not limited to instances of clash. In view of setting further the thesis' boundaries, it is worth taking a moment to acknowledge, in practical terms, the different free movement/fundamental rights interfaces that have emerged. Although these all merit further examination, the subsection will also highlight the practical fundamental rights implications of the use of a

two-stage approach in instances of clash, that demonstrate why particular focus on this phenomenon is warranted here.

In addition to the clashes between free movement and fundamental rights, visible in *Viking, Laval, Schmidberger, Omega* and *Dynamic Medien,* fundamental rights can act as facilitators of free movement within the two-stage model. A corollary of this development has been the facilitation of fundamental rights by free movement, since the former can now benefit, in certain situations, from the procedural priority that the two-stage approach offers to free movement. Finally, clashes between fundamental rights might arise *as a result of* the operation of the internal market, leading to simultaneous instances of clash and congruence between free movement and different Member States' fundamental rights rules.

The classic case demonstrating the ability of fundamental rights to facilitate free movement is *ERT*.[190] Here, the Court held that Member States must adhere to EU fundamental rights standards when acting in the scope of EU law.[191] Accordingly, in addition to the evidentiary hurdles imposed at the justification stage by the principle of proportionality, activity restricting free movement must respect fundamental rights before it can constitute a justified derogation. This increase in evidential burden facilitates free movement.[192]

This development clearly also has the potential to benefit fundamental rights since it provides a new opportunity for external fundamental rights review of domestic measures. Moreover, in this context fundamental rights running congruent to free movement are able to share the procedural benefit of the two-stage approach. Domestic measures restrictive of fundamental rights face the evidentiary obstacles imposed as a result of the finding of a *prima face* breach of free movement. This potential was realised, most famously, in *Carpenter*.[193] Mr. Carpenter ran a business in the UK that offered services to operators in other Member States. His third country national wife faced deportation. When the matter came before the Court of Justice, it held that:

[190] Case C-260/89 *ERT,* n.53
[191] The use of the phrasing 'implementing Union law' in the Charter, cast doubt on this approach but was maintained in post-Lisbon Case C-617/10 *Åklagaren v Fransson* [2013] EU:C:2013:105
[192] This development has itself led to debate in the literature e.g. F. Jacobs has argued that derogations, by their very nature, should fall outwith the scope of EU law, 'Human Rights Law in the European Union' (2001) 26(4) ELRev 331, 337; by contrast, J. Weiler asks what is so revolutionary about obliging Member States to respect fundamental rights when availing themselves of derogations created by Union law, 'Fundamental Rights and Fundamental Boundaries' in *The Constitution of Europe*, (CUP, 1999), 123; see also Spaventa, n.184
[193] Case C-60/00 *Carpenter v SSHD* [2002] EU:C:2002:434

It is clear that the separation of Mr. And Mrs. Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr. Carpenter exercises [the fundamental freedom to provide services]. That freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.[194]

Here, the fundamental right to family life under Article 8 ECHR not only ran congruent to Article 56 TFEU but was actually facilitated by it. At national level the normative clash in *Carpenter* was between the Carpenter family's Article 8 ECHR rights and immigration policy as a public interest. By engaging EU law, the conflict becomes one between the fundamental right to family life *and* the free movement of services, on the one hand, and national immigration rules on the other. It is also worth noting here, though the point will be developed in chapters two and four, that the connection between the family issues involved in the case and Mr. Carpenter's exercise of the freedom to provide services has been described as 'ephemeral'.[195] The Court merely declares that the separation of Mr. and Mrs. Carpenter would be 'detrimental' to his provision of services with no concrete explanation of the direct impact it would have.[196] Nevertheless, the automatic use of the two-stage model when free movement is restricted *in any way* triggers the imposition of the proportionality test on conflicting measures. Not only has a fundamental right been restricted, but free movement has been breached. Thus, the scales are more heavily loaded in favour of fundamental rights than they might be outside of the EU framework.

In this context, the two-stage approach might be viewed as unproblematic, since it works to the benefit of fundamental rights.[197] Indeed, the broad definition of a breach of free movement, displayed in *Carpenter*, creates a portal through which individuals, dissatisfied with how fundamental rights issues have been adjudicated domestically, can access a potentially different result at EU-level. However, this raises the important question of whether restrictions on free movement, especially those of a tangential nature, are sufficient, on their own, to render the CJEU an appropriate locus for assessing complex and diverse policy

[194] Para.39
[195] N. Nic Shuibhne, '(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*' (2012) 49 CMLRev 349, 374
[196] Although the Court makes an unconnected reference to Mrs. Carpenter's childcare role during its justification analysis, para.44. The referring court had also asked whether childcare might have provided indirect assistance to Mr. Carpenter's provision of cross-border services, although this question was not directly addressed by the CJEU, paras.19-20.
[197] Spaventa, n.184, 351-352

decisions made at Member State-level. This issue is unpacked in s.4.3 from the point of view of the division of competences between the Union and its Member States.[198] Chapter two additionally highlights that such policy review, by the CJEU, can *limit* Member States' abilities to design systems of social protection in instances of *clash* between free movement and fundamental rights. Here, the structural preference rests with free movement, working *against* fundamental rights. Indeed, the same imbalanced structural framework that benefits fundamental rights in *Carpenter* places them at a disadvantage in *Viking* and *Laval*.

Our next free movement/fundamental rights interface, involves clashes between fundamental rights that are *caused by* the exercise of free movement. *Familiapress* provides a good example of this phenomenon.[199] German publishers, wishing to sell magazines containing prize competitions in Austria, challenged a ban on such publications by that Member State as a breach of Article 34 TFEU on free movement of goods. The prohibition operated to protect the freedom of expression since smaller publishers could not offer such incentives to purchase, putting their continued existence at risk in a Member State that already suffered a lack of press diversity. The CJEU noted, however, that the Austrian measure also interfered with the freedom of expression of both the German publishers and their potential readership in Austria. This rights clash, between the German interpretation of the fundamental right to freedom of expression and that of Austria, only occurs because free movement allows for the flow of goods across their borders. In such a situation, the suitability of the CJEU as the site of adjudication is less open to challenge. As Nic Shuibhne argues, such a 'rights review [arising from the operation of the internal market]…ultimately can only fall to the Court of Justice'.[200] However, it remains arguable that the CJEU's current two-stage approach challenges its capacity to address this new fundamental rights challenge. This model will automatically favour the protection of the fundamental right running *congruent* to free movement over Member State fundamental rights norms that clashes with it. On the one hand, Member States might have to accept alteration to their methods of fundamental rights protection in light of their commitment to the internal market. On the other, as chapter two discusses in more detail, the breadth of free movement subjects important areas of Member State law and policy, having only oblique and incidental impact on the internal market, to CJEU review. Moreover, situations idiosyncratic to the Member States, such as low press

[198] See also Perišin, n.181, 80
[199] Case C-368/95 *Familiapress*, n.19
[200] N. Nic Shuibhne, 'Margins of Appreciation: national values, fundamental rights and EC free movement law', (2009) 34(2) ELRev 230, 244-245

diversity in Austria, might warrant specific methods of fundamental rights protection. Nevertheless, the Austrian rules are exposed to the evidentiary hurdles operating at the justification phase of the two-stage approach, not imposed on the German approach to freedom of expression, which runs *congruent* to free movement. This type of free movement/fundamental rights interface is relevant to this thesis. As Nic Shuibhne highlights, *Omega* can be re-categorised as a conflict, activated by the exercise of free movement, between the German understanding of the right to human dignity, which did not allow for 'playing at killing' and the UK definition of that right, which did.[201] *Dynamic Medien, Viking* and *Laval* can also be viewed in this way.

The above discussion of the distinctive fundamental rights needs of Austria in *Familiapress* has already highlighted one component of our 'impact trio' i.e. the ways in which the two-stage approach can threaten fundamental rights standards within the Member States. A full investigation of the practical fundamental rights consequences of the two-stage model is best conducted in chapters two, three, and four since they only arise as a result of the constitutional developments discussed in those chapters. In general, the CJEU only has occasion to review Member State fundamental rights rules, in this context, because of the expansion in the scope of the free movement provisions. However, a brief explanation of the other constituents of this 'impact trio' will be provided here as a point of reference.

It will be recalled that as part of the proportionality test, which operates pursuant to the two-stage model, fundamental rights must be protected in a way that is *necessary* for that goal. This is generally determined by reference to whether there are methods for attaining the relevant objective that are less restrictive of free movement.[202] However, viewing necessity through a free movement lens does not always offer adequate legal space to consider the *effectiveness* of alternatives, particularly in light of the specific characteristics of a Member State. *Familiapress* gives us one example in this regard. Similarly, in the context of consumer protection, safeguarded by Article 38 CFR, the Court's reliance on labelling as an alternative to Member State measures aimed at minimising consumer confusion arguably neglects to consider, in some cases, unique consumer needs arising from a Member State's language or

[201] Ibid
[202] Case C-36/02 *Omega,* para.36; Case C-368/95 *Familiapress*, n.19

traditions.[203] Second, an approach to necessity focused on what is least restrictive of free movement can underappreciate the inherently restrictive nature of some fundamental rights. Thus, commenting on *Viking* and *Laval*, Novitz remarks that '[i]t seems highly problematic that the legality of unions engaging in industrial action…depend[s] on whether…it would have been possible to achieve their objectives in a way which was, perhaps marginally, less restrictive of the free movement rights of, in many cases, the very enterprise with which they are in dispute'.[204] Finally, where complex Member State programmes for the protection of fundamental social rights restrict free movement, alternative means of attaining such social goals might not be feasible in light of practical and budgetary concerns. For instance, in *Watts*,[205] the Court held that recipients of medical services were entitled, pursuant to Article 56 TFEU, to claim reimbursement from the UK's National Health Service for treatment received in other Member States, in certain circumstances. Since the NHS is funded from general taxation, is free at the point of delivery, and had no method for such reimbursement, the ruling arguably posed a risk to the UK's programme of protecting the fundamental right to health.[206]

This subsection has outlined the different types of fundamental rights outcomes that are possible as a result of the use of the two-stage model. It has conceded that in cases of congruence between free movement and fundamental rights, the two-stage approach can actually operate to the benefit of fundamental rights but has argued that this is insufficient to neutralise the problems arising from the adoption of this imbalanced framework in instances of clash. Specifically, the focus of the proportionality test on whether fundamental rights can be protected in a way that is less restrictive of free movement reduces legal space for consideration of the idiosyncratic fundamental rights needs of the Member States, the peculiarities of certain types of fundamental rights, and the logistical and financial complexities involved in designing systems of social protection. Having delineated the key practical issues at stake, the discussion now turns to the theoretical justifications for affording special protection to fundamental rights.

[203] Detailed in ch.2. See Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] EU:C:1994:34
[204] T. Novitz, 'A Human Rights Analysis of the *Viking* and *Laval* Judgments' (2007–2008) 10 CYELS 541, 560-561
[205] Case C-372/04 *Watts v Bedford PCT* [2006] EU:C:2006:325
[206] Defined as 'fundamental' by Art.35 CFR. Discussed further in ch.2

4.2. Undermining the fundamentality of fundamental rights? Theoretical justifications for fundamental rights protection

Commenting on the Court's use of the two-stage approach in *Schmidberger*, Brown argues that, '[u]sing the language of *prima facie* breach…of economic rights suggests that, even if that restriction is ultimately justified, it remains something which is at its heart 'wrong' but tolerated. This sits rather uneasily with the State's usually paramount constitutional obligation to protect human rights'.[207] This implies that, regardless of the practical effects of the two-stage model upon the protection of fundamental rights, this imbalanced framework might be problematic from first principles. The requirement that fundamental rights have to justify the restrictions they place on free movement *at all* could be said to call into question the very fundamentality of fundamental rights. However, fundamental rights, themselves, remain 'an essentially contested concept'.[208] This raises questions about whether fundamental rights are in fact worthy of special protection or their position at the apex of normative hierarchies. Since this issue has long been, and continues to be, the subject of intense and rigorous debate, it is beyond the scope of this work to conduct an in-depth investigation in this regard. Nonetheless, since the thesis rests upon the presumption that the subjugation of fundamental rights to the free movement provisions is problematic, it is necessary to provide a broad overview of theoretical justifications for fundamental rights protection. Ultimately, although acknowledging the strong body of literature that is deeply critical particularly of the universal nature of fundamental rights, the section will postulate that these criticisms do not diminish their utility. As social facts, rather than universal truths, fundamental rights can be used to shine a spotlight on the particular values of society. This can be especially important within a polity such as the EU, which, having been built on very focused, economic foundations, might be architecturally ill-equipped to appreciate the competing, but equally legitimate, interests operating within wider society.

A long-established justification for the special protection of fundamental rights is that they have their foundations in a-political, a-historical 'natural law', and are applicable universally

[207] N.21, 1508
[208] F. Hoffmann, 'Foundations beyond Law', in C. Gearty, C. Douzinas (eds), *The Cambridge Companion to Human Rights Law*, (CUP, 2012), ch.4, 83, citing also W. Gallie, 'Essentially Contested Concepts' (1956) Proceedings of the Aristotelian Society 167

to everyone by virtue of the uniqueness of being human.[209] The history of this theoretical underpinning is traceable through 'the *ius naturalis* of the Middle Ages…the 'rights of man' and 'droits de l'homme' of the English, American and French revolutions…up to the Universal Declaration of Human Rights [UDHR]…'.[210] Thus, pursuant to Article 1, the UDHR declares that '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'. This is frequently presented as a reaction to the atrocities of the Second World War and the 'species-segmenting abuse of state power by the Nazi state'.[211] Similarly, rights exist, therefore, as Dworkinian 'trumps' against government policies, particularly excessive or barbarous acts of the State.[212] Gewirth, amongst others, also grounds justification for fundamental rights in the rational, moral needs of the universal human actor.[213] This approach assumes that fundamental rights promote 'normative agency' by protecting the 'goods' of freedom and well-being. These are a necessary pre-condition to a person's own goods or desired actions. However, she/he must equally accept that all other purposive agents also have rights to freedom and well-being. This creates, in the Hohfeldian sense, 'claim-rights' but also 'duties'. These 'exist and are mandatory because they are logically necessary conditions of self-interested action'.[214] In this way, fundamental rights provide a framework for our rational relationships with each other. Thus, the theoretical justification for criticising subjugation of fundamental rights to free movement provisions can lie in the fact that fundamental rights reflect needs central to our human dignity and exist to provide us with a core of essential safeguards in our interactions with the State and each other. They should not be denied by the operation of market freedoms since they are universal, absolute, and inviolable.

Nevertheless, the notion that fundamental rights justification is grounded in their a-political, timeless, rational universality has been subjected to much criticism.[215] First, the effectiveness of fundamental rights, in securing human dignity or protecting us from State power has been questioned. Douzinas asks, '[h]as the…ubiquity of rights ended domination and exploitation,

[209] For an overview in this regard, see C. Beyani, 'Reconstructing the universal: human rights as a regional idea', in Gearty, Douzinas, ibid, ch.9, 173-175
[210] Hoffmann, n.208, 85-86
[211] A. Grear, ''Framing the Project' of International Human Rights Law: reflections on the dysfunctional 'family' of the Universal Declaration', in Gearty, Douzinas n.208, ch.1, 26-27; Beyani, n.209
[212] R. Dworkin, 'Rights as Trumps' in J. Wasdrom, *Theories of Rights*, (OUP, 1984), 153
[213] A. Gewirth, *The Community of Human Rights*, (OUP, 1996) 45
[214]Summarised by C. Douzinas, 'The Poverty of (Rights) Jurisprudence', in Gearty, Douzinas, n.208, ch.3, 62; on this view see also, C. Nino, *The Ethics of Human Rights*, (Clarendon,1991) 30
[215] This discussion draws heavily on the review of human rights critiques conducted by C. Gearty in *Principles of human rights adjudication*, (OUP, 2004) ch.2

repression and violence… This is a comforting idea, daily denied in news bulletins'.[216] Indeed, Bentham argues that these experiences might provide a desire for rights but 'hunger is not bread'. For him, focused positive law, targeted at particular ends would be more effective than vague declarations of fundamental rights based in natural law, which he famously declared 'nonsense upon stilts'.[217]

The claim that fundamental rights are a-political 'trumps' against States has been questioned by Koskenniemi, particularly in light of the restrictions that human rights instruments, such as the ECHR, tend to allow to be imposed upon their exercise. He argues that the identification, meaning, and applicability of rights are consequently dependent on contextual assessments and conflicting arguments about the political good. If decision-making procedures define rights, they cannot be controlled by them.[218] Nevertheless, the use of 'rights-language' can also be criticised for petrifying political debate and thereby stagnating social development.[219] Similarly, it is argued that the focus of fundamental rights on individual freedoms reflects a Western hegemony centred on liberal democracy and capitalism.[220] This leaves them open to the criticism that they operate to the benefit of the privileged, for instance property-owning individual, undermining their own claim of universal application.[221] Douzinas posits that the argument that fundamental rights reflect the minimum claims and duties necessary, in our relationships with other rational actors, for the *pursuit* of freedom and well-being fails to appreciate that 'the gravest deprivation and constraints of liberty' are not caused by the actions of other individual actors but by 'obscene inequalities created by…large-scale economic or social structures'.[222] Linked to this, Grear argues that 'the construct of the universal human being simply does not do justice to the full complexity, the sheer fleshy variability and multiple forms, colours, shapes, sex/genders of the embodied human personality in all its vulnerability'.[223] This can result in exclusion of minority groups. Evidence of an 'agenda-setting majority' is found, for example, in the reference to '*brother*hood', in Article 1 UDHR. If fundamental rights cannot be viewed as a-political then they can also be criticised for leaving political questions in the hands of unelected judges

[216] N.214
[217] J. Waldron (ed), *'Nonsense upon Stilts.' Bentham, Burke and Marx on the Rights of Man,* (Methuen, 1987) 53
[218] Koskenniemi, n.69, 99
[219] Ibid
[220] Beyani, n.209, 185; Grear, n.211
[221] Gearty, n.215, 107; see also K. Marx, 'On the Jewish Question' (1844) Deutsch-Französische Jahrbücher
[222] Douzinas, n.214, 68-74
[223] N.211

rather than those of democratically-elected politicians. Speaking in the British context, Ewing has argued that codified rights would 'empower judges to unsettle decisions made in the political arena by the people's representatives and thereby frustrate the democratic process'.[224]

However, as Gearty identifies, much of the 'problem with human rights [lies in] the claims [they] make to universal absolutes'.[225] He argues that fundamental rights can still be said to exist and to serve a useful societal purpose but as a set of social facts, rather than as a collection of revealed truths.[226] He relies on the claims of Singh, who postulates that, [s]ince World War Two, the age-old problem of whether there are human rights and where they come from…has largely been avoided, if not resolved, by the social fact that the international community has come to accept a set of principles as being of global application'.[227] As Hoffmann points out, once a fundamental right is enshrined in a domestic constitution or a State becomes party to an international human rights treaty, 'the question of foundations becomes immaterial. All that counts from a legal perspective is whether a particular norm is (legally) valid and…whether it has been complied with…'[228]

Nor does Gearty consider Bentham's argument, that fundamental rights represent 'wants/desires' rather than 'lived realities', to undermine their value. He views them 'as a mission statement for humanity, not a legal charter guaranteeing an impossible Nirvana'.[229] Similarly, Günther postulates that fundamental rights provide us with a language for articulating a 'rejection of a concrete historical experience of injustice and fear'.[230] They allow us to assert, in our interactions with the State, each other, and ourselves, that we deserve the recognition and respect given to all.[231] Gearty also welcomes the *transparency* with which most fundamental rights documents accept that their provisions can be restricted by political reality. Although this leaves political decision-making to judges, he speculates that, viewed as *civil liberties*, the fundamental rights to the freedoms of conscience, expression and

[224] K Ewing, *Human Rights and Labour Law. Essays for Paul O'Higgins* (Mansell, 1994), ch.7, 156
[225] Gearty, n.215, 17
[226] N.215, 18
[227] R. Singh, *The Future of Human Rights in the United Kingdom: Essays on Law and Practice*, (Hart, 1997), 38
[228] Hoffmann, n.208, 83-84
[229] N.215, 19
[230] K. Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in Alston et al, n.61
[231] Douzinas, n.214, 73 who nevertheless calls rights-language a 'rudimentary and defective' means of achieving this goal. Similarly, Koskenniemi argues that this could engender a culture of bad faith, n.69, 99

association, the fundamental right to freedom from torture and arbitrary imprisonment, and to vote, are part of the 'essential fabric that goes into making our democratic tapestry'. They ensure the relevant organs of the State are truly and properly representative.[232]

Moreover, Gearty's acceptance that fundamental rights are not the a-historical, rational 'discoveries' of the self-interested individual but can reflect a societal response to the 'rapid progress of sentiments',[233] creates space for a broader, more inclusive approach to fundamental rights. He draws on the work of Sypnowich, who argues that 'if human rights are shaped by social factors, there can be no ultimate, timeless "core" of negative human rights to which positive rights stand as dispensable extras'.[234] Gearty then points to legislative intervention that could encapsulate this wider view of human dignity, such as the National Health Service Act 1946 and the Housing (Homeless Persons) Act 1977, in the UK context. He argues that, though 'not presented in explicitly 'human rights' terms…it is nonetheless real for that'.[235]

If this thesis rests on the presumption that the subjugation of fundamental rights to the free movement provisions is problematic, it relies on the above counter-arguments to established fundamental rights critiques to justify its supposition. Regardless of the theoretical debates as to the existence and foundations of fundamental rights, the Union's commitment to respecting them exists as a social fact by virtue of Article 6 TEU, the Charter and the general principles. More broadly, this coheres with the utilisation of fundamental rights generally within the international community. Indeed, as a polity founded by Western liberal democracies in the post-Second World War era, one would expect to see the contemporary Union value fundamental rights highly, in a constitutional sense. Drawing on Hoffmann's assertions, this 'suspends the essential contestability of human rights' and introduces established questions of legal compliance.[236] Therefore, the EU's self-imposed fundamental rights obligations,[237] warrant, of themselves, an analysis of whether the Union is meeting its own pledges. The Union's economic history also, arguably, necessitates the use of a fundamental rights 'mission statement' in the Gearty sense. Since, as this thesis will demonstrate, the EU's economic

[232] N.215, ch.3
[233] Drawing on R. Rorty, 'Human Rights, Rationality and Sentimentality' in S. Shute, S. Hurley (eds), *On Human Rights,* (Basic Books, 1993), 122
[234] Gearty, n.215
[235] N.215, 88
[236] Hoffmann, n.208, 83-84
[237] Via the agreement of its Member States

foundations structurally influence its approach to competing areas of law and policy, fundamental rights shine a crucial spotlight on competing but important societal goals.

The structural prioritisation of free movement also shifts the perspective of arguments that fundamental rights protection is undemocratic. As chapter two will explore in more detail, the broad scope of the free movement provisions exposes a wide range of Member State law and policy to judicial scrutiny. This can include 'basic' fundamental rights contained in national constitutions, but also focused and detailed legislative programmes for fundamental rights protection. Both can reflect the choices of the population, implemented through their elected representatives. For instance, the fundamental right to human dignity, contained in German Basic Law, and the subject of a clash with the free provision of services in *Omega*, arguably reflects the fundamental rights priorities of the German nation. In *Watts*, the UK's National Health Service, a legislative creation and frequently at the centre of political discussion, was potentially put at risk by the restrictions it imposed on the free provision of services. Interestingly, then, at the Union-level, fundamental rights might not (always) serve to remove political decision-making from elected representatives, but to remind the Union's judicial branch of the democratic implications of their interpretations of EU primary law.

The focus of this thesis, on testing compliance with the 'social fact' of the Union's own commitment to fundamental rights, also provides it with a definitional framework. It will take a broad approach to fundamental rights grounded in the civil, political, economic and social rights contained in the Union's own Charter and the general principles of Union law, influenced by the common constitutional traditions of the Member States and the international treaties to which they are signatories. This is also justified by the philosophical acceptance that, in light of the ubiquity of fundamental rights and ongoing debate in the field, the term 'fundamental right' is 'nearly criterionless'.[238] They are 'a dynamic and highly adaptive process'.[239] Since the Union's own Charter contains a collection of social rights, this permits the incorporation of programmatic rights into our definition of fundamental rights. This coheres with the increasing recognition of economic and social rights, traditionally viewed as aspirational, programmatic, and therefore not judicially cognisable, as of equal legal status to those of a civil and political nature. For instance, the provisions of the ECHR, focused on civil

[238] J. Griffin, *On Human Rights*, (OUP, 2008) 14
[239] Hoffmann, n.208, 96

and political rights, have been interpreted so as to include social rights[240] while additional protocols have included, for instance, the right to education.[241] We have also seen the emergence of third generation 'solidarity' fundamental rights such as rights to a healthy environment and consumer protection. These 'new' fundamental rights, especially those of the third generation, are not unanimously accepted. Some commentators argue that they dilute the fundamentality of fundamental rights.[242] Crucially, however, for our purposes, the EU has been part of this eruption of fundamental rights. For instance, the Union's own fundamental rights Charter makes reference to consumer and environmental protection.[243] Indeed, the Charter's status as a modern catalogue of fundamental rights, which has more contemporary relevance than the ECHR, and its 'innovation' in placing civil and political rights alongside economic and social rights, has been welcomed.[244] Significantly, the Charter also presents (at least some of) the free movement provisions as fundamental rights. Chapter five will explore the significance of this in terms of how free movement is conceived and ultimately argue that free movement should be treated as equivalent to a fundamental right during the adjudication of conflicts between the market freedoms and (other) fundamental rights.

As the thesis conducts a diagnostic analysis of the impact of the Union's economic history on its contemporary ability to protect fundamental rights, it will, at times, retroactively apply a fundamental rights definition to 'recent' rights, previously operating as public interests. For instance, the Court has not adapted its adjudicative methodology in light of the Charter's elevation of consumer protection to a fundamental right.[245] This introduces the related question of how the thesis will approach the Charter's 'principles'. Although they feature in the Charter, they do not enjoy the same legal force as 'rights', only being judicially cognisable in the interpretation of legislative and executive acts of the Union institutions, and the Member States when implementing Union law.[246] The Charter does not stipulate which of its provisions are 'principles' but they are thought to apply to its programmatic content such as the right to housing assistance[247] or consumer protection.[248] It is submitted that principles can,

[240] E.g. the right to collective bargaining via Art.11 ECHR, the freedom of association: *Demir and Baykara v Turkey* App.no:3450397
[241] Protocol 1, Art.2
[242] Koskenniemi, n.69
[243] Arts.38 and 37 CFR respectively
[244] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', (2011) 11(4) HRLR 645
[245] Case C-481/12 *Juvelta* [2014] EU:C:2014:11; Case C-577/11 *DKV Belgium* [2013] EU:C:2013:146
[246] Art.52(5) CFR
[247] Art.34 CFR

in any case, be viewed as 'fundamental rights' in the framework of a thesis focused on instances of clash between free movement and fundamental rights. As an institution of the Union,[249] and pursuant to Article 52(5) CFR, the Court should still take these rights into account in its interpretation of free movement. If the thesis seeks to examine the Union's 'mission statement' against its legal reality, then the Charter principles remain relevant. Since the focus is on the Union's constitutional pledges, the thesis will generally also adopt the term 'fundamental rights' as opposed to 'human rights' as this is the preferred terminology in the literature surrounding EU constitutional law. It is, however, accepted that some view 'fundamental rights' as a broader term, incorporating a wider-range of constitutional law, than 'human rights'.[250]

If the theoretical justification for fundamental rights protection lies in their existence as a social fact, then it is, additionally, vital to consider the impact of the two-stage model of free movement/fundamental rights adjudication from Union constitutional perspectives. The following subsection explores this issue.

4.3. Union constitutional perspectives: is the two-stage model architecturally old-hat or in line with the contemporary constitutional framework?

In assessing the constitutional 'fit' of the two-stage approach within the Union's present-day framework, we will first accept that a two-stage approach could be viewed as a procedural eventuality inherent in the position of the free movement provisions within the Treaty. However, it will be argued that alternative Treaty interpretations, more in-keeping with the Union's fundamental rights obligations, are available. Next, an examination of the contemporary constitutional framework in a substantive sense, with particular focus on the Union's forthcoming accession to the ECHR, and the primary status of the Charter, will demonstrate that the two-stage model does not adequately meet the Union's new goals and constitutional commitments.

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[248] Art.38 CFR

[249] Art.13 TEU; see also Case C-544/10 *Deutsches Weintor*, n.37 in which the Court incorporated the right to health in its analysis of EU secondary law.

[250] B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston, n.61, ch.27, 850

4.3.1. Is the two-stage approach a procedural eventuality inherent to the free movement provisions?

It might be argued that the breach/justification model is a procedural inevitability contained in, and required by, the Treaty itself. The free movement provisions lay down a set of normative rules. For instance, pursuant to Article 34 TFEU:

> Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Article 36 TFEU, as a *subsequent* provision, arguably therefore exists as a *defence* to rules that breach this general prohibition. Further, Article 36 states that activity restricting the free movement of goods can be '*justified*' if pursuing a goal included in that provision, suggesting that the burden of proof rests on the measure in breach. Indeed, Nic Suihbhne remarks that, since the Treaty expresses justifications as derogations from primary rights, standard interpretative canons require the free movement provisions to be interpreted widely and exceptions from them narrowly.[251] She nevertheless accepts that its use is controversial in light of the encroachment of free movement into new areas of Member State law and policy:[252]

> 'There is a searing tension at the heart of how we conceptualise justification in free movement law…[it] has evolved overtime to become the prime space within which public interest arguments are aired…It is where we pitch the market 'against' other values…the language is about balancing and weighing, not derogating. We are trying…to make the justification framework operate for us in a way that its legal construction in the Treaty cannot achieve'.[253]

However, whether the structure of the Treaty *requires* a two-stage approach is open to question, certainly in relation to fundamental rights protection. First, taking Article 36 TFEU as an example again, its opening sentence also states that, '[t]he provisions in Article 34…*shall not preclude* prohibitions or restrictions on imports…justified [*inter alia*] on grounds of public morality, public policy, or public security…[emphasis added]' This can be interpreted as meaning that rules cannot be prohibited by Articles 34/35 *in the first place*

[251] Nic Shuibhne, n.44, 26
[252] See ch.2
[253] N.44, 26

where they pursue a justifiable aim. In other words, it is arguable that Articles 34 and 36 must be read *alongside* each other, as part of an overall assessment of what is and is not proscribed under EU law.

Even if the positioning of Articles 34 and 36 implies some sort of structural subjugation of the latter to the former, Article 36 states only that national rules must not constitute arbitrary discrimination or disguised restrictions on trade. This does not dictate the use of a proportionality test that assesses the 'necessity' of a measure by reference to what is least restrictive of free movement. Moreover, as highlighted above, fundamental rights do not actually feature in any of the Treaty derogations from the free movement provisions. Accordingly, the breach/justification dynamic, arguably inherent in the relative positions of Articles 34 and 36, does not have to apply to clashes between free movement and fundamental rights. Instead, the need for fundamental rights protection can be drawn directly from the Union's fundamental rights obligations imposed by Article 6 TEU. This removes fundamental rights considerations from the standard wide/narrow interpretative canons that Nic Shuibhne discusses.[254]

Thus, the structure of the Treaty does not appear to necessitate a two-stage approach for adjudicating clashes between free movement and fundamental rights. Moreover, and significantly, the current adjudicative framework does not cohere with the present-day aims of the Union, which are much broader than the economically-focused goals of the EEC.

4.3.2. The need to respect the contemporary constitutional framework and the division of labour in meeting Treaty goals

This subsection will argue that the Court's two-stage adjudicative model is ill-suited to the Union's current substantive constitution. By charting the evolution of the Union's goals beyond economic integration, it will postulate that the structural prioritisation of free movement is no longer an understandable mechanism by reference to the Union's own constitutional confines. Further, since the Union tasks the Member States with achieving some of its more recent aims, this necessitates a model that leaves the Member States with

[254] This is discussed more in the context of *alternatives* to the two-stage model, in ch.5

sufficient space to perform this function. Moving from the general to the specific, the subsection will posit that the two-stage approach is particularly outmoded in light of the Union's future accession to the ECHR, since that framework cannot permit the structural subjugation of fundamental rights to the free movement provisions. The primary status of the Charter also realigns the core tasks of the Union, calling into question the contemporary suitability of a procedural preference for free movement.

4.3.2.1. Charting the expansion of Union goals

As section 3.2.1 outlined, although the drafters of the Rome Treaty were also 'resolved to ensure the…social progression of their countries,'[255] the core task of the EEC was economic integration through the creation of the common market.[256] However, as Ludlow has pointed out, 'the EU has since developed into a more explicitly comprehensive legal order'.[257] This can be tracked through key amendments to the founding Treaties, though these changes, particularly in the social arena, were often precipitated by far-reaching and ambitious soft-law programmes, such as the Lisbon Agenda,[258] which recognised the inextricable link between economic and social progression.[259] Significantly, the Maastricht Treaty signalled a move towards political, as well as economic, integration. The European Economic Community became the European Community; the European Union was created, offering a legal framework for intergovernmental efforts in the areas of Common Foreign and Security Policy, and Justice and Home Affairs; the concept of Union citizenship was formalised, attaching free movement rights to individuals' status as Union citizens rather than just their roles as factors of production. The Amsterdam Treaty adopted a general provision prohibiting discrimination on the basis of sex, race, ethnic origin, religion, belief, age, or sexual orientation;[260] and incorporated Maastricht's Social Agreement into the Treaty proper, allowing the Union to take measures in areas such as the social protection of workers. The Lisbon Treaty developed

[255] Preamble, TR
[256] Art.2 EEC
[257] A. Ludlow, 'The Right to Strike: a Jurisprudential Gulf between the CJEU and the ECtHR', in K. Dzehtsiarou et al, *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR*, (Routledge, 2014), ch.8, 129-130
[258] Common Actions for Growth and Employment: The Community Lisbon Programme COM(2005) 330 final (updated)
[259] For comment see, D. Trubek, L. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11(3) ELJ 343; M. Daly, 'EU Social Policy After Lisbon' (2006) 44 JCMS 461
[260] Art.6a TA/Art.19 TFEU

the aims of the EU further still. Indeed, Article 3 TEU, containing 'quite a task list'[261] for the contemporary Union, provides that the Union's aims are, *inter alia*: to promote peace…and the well-being of its peoples; to offer its citizens an area of freedom, security and justice; to ensure the free movement of persons with appropriate measures in respect of external borders, asylum and immigration and combating crime; to establish an internal market; to work for the sustainable development of Europe based on balanced economic growth, price stability, a highly competitive social market economy, aiming at…social progress and a high level of protection of the environment and the promotion of scientific and technological advance; to combat social exclusion and discrimination; to promote social justice, and equality between men and women; to protect the rights of the child; and to establish monetary union. The Lisbon Treaty additionally merged the European Community and European Union into an overarching European Union, a move, arguably, towards greater supranationalism in traditionally intergovernmental areas.[262] For instance, the Union's power to act in the Area of Freedom Security and Justice was strengthened significantly.[263] Douglas-Scott notes that this expansion of EU goals requires the EU to confront issues with obvious relevance to fundamental rights, not relevant to the EEC, such as asylum and criminal matters.[264]

On the specific issue of fundamental rights, as outlined in section 2.1, the Court accepted, in a series of cases, the existence of fundamental rights in the EU legal order by virtue of the general principles of Union law. At Maastricht, the Union pledged to respect fundamental rights[265] while the Amsterdam Treaty later claimed that the Union is founded on respect for fundamental rights.[266] It also introduced Article 7 TEU, allowing for the suspension of Member State voting rights in event of fundamental rights' violations. Outside the framework of Treaty amendments, the EU Charter of Fundamental Rights was solemnly proclaimed by the EU institutions in 2000.[267] The Lisbon Treaty introduced two highly significant changes to the Union's fundamental rights framework. Pursuant to Article 6(2) TEU, it imposes a *requirement* that the EU accede to the ECHR, while Article 6(1) TEU accords primary legal status to the Charter. These drivers of adjudicative change, in terms of the interaction between

[261] Nic Shuibhne, n.44, 43
[262] J-C Piris, 'Where Will the Lisbon Treaty Lead Us?' in A. Arnull et al (eds), *A Constitutional Order of States: Essays in Honour of Alan Dashwood*, (Hart, 2011) ch.4, 60-61
[263] For comprehensive discussion of the changes brought about by Lisbon see M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds Not Hearts' (2008) 45(3) CMLRev 617
[264] Douglas-Scott, n.244, 648
[265] Art.F(2) TM
[266] Art.6 TEU
[267] N.60

free movement and fundamental rights, are substantial and will consequently be discussed in the following subsections.

First, however, it is important to note that the incremental expansion in EU objectives and competence has been matched by the progressive strengthening of Member State voice in the EU legal order.[268] The introduction of the principle of subsidiarity at Masstricht is one example. Dougan finds it 'unsurprising' that this has continued with the Lisbon Treaty: 'each step towards greater supranationalism is counterweighted by more effective checks and balances to protect Member State prerogatives and ensure the Union remains responsive to domestic concerns'.[269] Indeed, in the fundamental rights context, there is arguably a 'tension between the Charter's objective of strengthening EU fundamental rights protection and its statement that it does not confer any new powers' on the Union.[270] Of particular interest, from a fundamental rights perspective, might be the strengthening, by Lisbon, of the Treaty's national identity clause, contained in Article 4(2) TEU.[271] Specifically, its reinforcement raises questions as to whether it might be used to underpin domestic fundamental rights provisions when they are pitted against the Treaty free movement provisions. To that end, Preshova argues that fundamental rights fall within the definition of national identity.[272] However, while the reference of the German *Bundesverfassungsgericht* to Article 4(2) TEU in its *Lisbon* decision,[273] suggests that its concretisation post-Lisbon has added a 'truly new flavour'[274] to the Union's legal obligations, the national constitutional courts have, in fact, 'left open the precise determination of the content of national or constitutional identity by using general and abstract formulations'.[275] Indeed, ever since *Solange II,* national constitutional courts have consistently accepted equivalent, as opposed to identical, fundamental rights protection in relation to the conformity of EU rules with their own

[268] P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', (2002) 39 CMLRev 945
[269] Dougan, n.263, 692
[270] Eeckhout, n.270, 981
[271] 'The Union shall respect the equality of the Member States before the Treaties as well as their national identities…' Other changes include the strengthening of subsidiarity by the 'yellow-card' procedure (Arts.5(3) and 12(6) TEU and Protocol 2), and the 'emergency brake' for EU legislative acts affecting Member State social security systems (Art.48 TFEU)
[272] D. Preshova, 'Battleground or Meeting Point? Respect for National Identities in the European Union – Article 4(2) of the Treaty on European Union', (2012) 8 CYELP 269, 284-288, citing Case 473/93 *Commission v Luxembourg* [1996] EU:C:1996:263
[273] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), para.240
[274] Preshova, n.272
[275] Ibid, 281; The German *Bundesverfassungsgericht* referred to the 'inviolable core of the Basic Laws' constitutional identity', n.273; also G. Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in which there is no Praetor,' (2011) 17(4) ELJ 470, 475

constitutional requirements.[276] This suggests that a strengthened Article 4(2) will do little more than provide a platform for renewed judicial posturing in respect of who has the final say on fundamental rights. Preshova is more optimistic arguing that the national identity clause could play a role in determining the degree of fundamental rights protection to be afforded at EU-level. Specifically, while in cases such as *Omega*, the Court processed fundamental rights questions through the justification stage of the two-stage model as a matter of EU law, Article 4(2) operates outside this framework and 'crucially [and] clearly refers back to the Member States'.[277] This might be particularly relevant to meeting fundamental rights needs that are peculiar to individual Member States. Nevertheless, he acknowledges that the Court's most recent case-law does not provide much optimism in this respect.[278] On the other hand, the Court's recent decision to declare the Data Retention Directive[279] invalid as a violation of Articles 7, 8, and 11 CFR might reveal the indirect influence of the national identity clause,[280] since a number of national constitutional courts had already declared domestic implementing legislation to be unconstitutional.[281] Thus, although it seems unlikely that Article 4(2) TEU requires the primacy of national constitutional provisions over EU law as a matter of principle, it does imply a contemporary need for greater balance where there is conflict between the fundamental principles of the EU legal order, such as free movement, and the constitutions of the Member States.

As well as strengthening Member State voice in tandem with the expansion of its goals, the Treaty has also taken an imbalanced approach to the implementation of those objectives, dividing labour between the Union and the Member States. While in some fields - for instance, the customs union - the EU has exclusive competence to take action, in others - such as social, environmental, and consumer protection policies - it shares competence with the

[276] C. Sabel, O. Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order', (2010) 16(5) ELJ 511
[277] Preshova, n.272, 284-293.
[278] Ibid, although the Court explicitly referred to Art.4(2) TEU for the first time in Case C-208/09 *Sayn-Wittgenstein* [2010] EU:C:2010:806, para.83, it incorporated it into the justification analysis. Nevertheless, national identity could have influenced its undemanding approach to proportionality. Case C-391/09 *Runevič-Vardyn* [2011] EU:C:2011:291, presents the national identity clause as something of a double-edged sword in terms of fundamental rights since the need to consider language as part of a Member State's national identity arguably diminishes useful Union-level checks on Member State protection of fundamental rights running *congruent* to free movement.
[279] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L105/54)
[280] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland a.o.* [2014] EU:C:2014:238, although the outcome might also simply arise from the far-reaching fundamental rights implications of the Directive.
[281] E.g. the German *Bundesverfassungsgericht* in *1BvR 256/08, 1BvR 263/08, 1 BvR 586/08*, para.218

Member States. In areas such as education and health, the EU may only support, coordinate or supplement the actions of the Member States.[282] The EU still has no general jurisdiction in the field of fundamental rights. Thus, in relation to some of the aims of the Union contained in Article 3 TEU, and many of the rights in the Charter, the EU relies on the Member States to meet its goals.[283] Discussing social policy, Ludlow notes that activity 'has been developed either at a European level or has been left deliberately in the hands of the member states as a counterweight to transnational economic integration'.[284] For instance Article 28 CFR protects the right to strike. However, Article 153(5) TFEU explicitly excludes EU competence in this regard, while Article 153(1) explains that the Union will 'support and complement' the activities of the Member States in relation to, *inter alia*, the social protection of workers. Accordingly, though the Union has goals beyond the internal market, the Treaty presents the Member States as the principal agents of meeting some (though clearly not all) of them, accepting diversity in their execution. However, this requires that Member States be afforded sufficient legal space to pursue these endeavours when domestic measures clash with EU-level rules, including primary free movement law. As Mason recognises, separating economic and social rights, as the Rome Treaty envisaged, is a 'sheer conceptual impossibility'.[285] Thus, an important challenge, identified by Nic Shuibhne, is 'for the Court to achieve effective internal market regulation while still allowing for more localised regulatory diversity in keeping with the constitutional mandate of shared EU/Member State competence'.[286]

Indeed, Piris argues that the asymmetry between the Union's approach to social policy, which 'leaves almost complete freedom to the Member States' and its implementation of free movement is what caused the large-scale reaction to *Viking* and *Laval*.[287] In fact, in those cases the Court explicitly acknowledged that the EU had a social, as well as economic purpose, and the consequent need to balance the free movement provisions against social policy.[288] Nevertheless, the Court processed this conflict of objectives through its existing

[282] Arts.3,4, and 6 TFEU.
[283] As a corollary, this often reflects policy areas that the Member States consider 'too sensitive to relinquish to the EU'. Accordingly, coordination of Member State policy, through soft-law mechanisms such as the Open Method of Coordination, can arguably be seen enhancing cooperation in fields that cannot be addressed through hard-law, particularly harmonisation. See Daly, n.259, p.474
[284] Ludlow, n.257, 129-130.
[285] L. Mason, 'Labour Law, the industrial constitution and the EU's accession to the ECHR: the constitutional nature of the market and the limits of rights-based approaches to labour law', in Dzehtsiarou et al, n.257, ch.9, 140
[286] Nic Shuibhne, n.44, 25
[287] Piris, n.262, 68-69
[288] Case C-438/05 *Viking*, para.79; Case C-341/05 *Laval*, para.105, n.1

two-stage model, requiring social policy to justify itself against the pursuit of economic integration and rendering it procedurally disadvantaged. This results in clear disconnection, at the judicial-level, between the Treaty's commitment to social progression under its social chapter and the deregulation of Member State social policy as a result of the pursuit of free movement. Moreover, as Maduro argues, 'this has not been (at least totally) compensated by social policies arising at the level of the European Union'.[289] This will evidently be particularly true in areas where the EU has limited or no legislative competence. Thus, as Maduro has noted:

> [W]hen market integration [challenges] the regulatory powers of the States, which are in many cases aimed at protecting…social rights, such as the right to education, health and social protection, fair working conditions, minimum income, and, in a broader sense, 'other 'social' rights, such as consumer and environmental protection [it also undermines its own objectives since] many of these rights are recognised in the Treaties as goals of the European Union.[290]

In other words, the Union is at something of a constitutional crossroads: it either needs to act to ensure that its social objectives are being met at the European-level, despite the deregulatory effects of free movement, or, at the very least, the Court needs to adapt its adjudicative methodology in a way that accepts the need for the Union to 'back off' and allow the Member States room to pursue legitimate aims outside of the shadow of a breach of free movement. Indeed Maduro called for a judicial approach to free movement that accepts, 'given the EU's contemporary goals, [that] States should be left sufficient policy autonomy to ensure the continuation of welfare state traditions albeit under new economic constraints'.[291]

More than a decade has passed since Maduro conducted this assessment of the balance between free movement and social rights in the EU. Nevertheless, as the above discussion demonstrated, the two-stage approach has been maintained for interactions between free movement and fundamental rights, even as the Union's aims have further broadened, and its commitment to fundamental rights has become more entrenched. As a result, there remain

[289] Maduro, n.107, 464. As a recent example, the Union legislature has struggled to respond to *Viking* and *Laval*, with the proposed Monti II Regulation being abandoned following the use by some national parliaments of the 'yellow-card procedure' 'Proposal for Council Regulation on the exercise of the right to take collective action within the context of freedom of establishment and the freedom to provide services' COM(2012) 130 final
[290] N.107, 471
[291] Ibid

persistent calls in the literature for the adaptation of the Court's adjudicative methodology.[292] Further, Advocate General Cruz Villalón in *Santos Palhota*, argued that the coming into force of the Lisbon Treaty meant that social policy derogations from the free movement provisions could no longer be interpreted narrowly.[293]

These general expansions of the EU's goals beyond economic integration, and the Union's explicit commitment to respecting fundamental rights, pose a direct challenge to the constitutional 'fit' of the two-stage approach. The discussion now shifts to a more focused consideration of two key drivers of adjudicative change post-Lisbon, specifically the EU's accession to the ECHR and the primary law status of the Charter.

4.3.2.2. When systems collide: the impact of accession to the ECHR on the adjudicative preference for free movement

The EU's future accession to the ECHR, required by Article 6(2) TEU, is a potentially very significant driver of change in respect of the CJEU's current two-stage model.[294] This is because there is a clear 'systems clash' between the way in which the Strasbourg Court adjudicates conflict between fundamental rights and competing interests when compared with the Luxembourg Court's model for resolving clashes between free movement and fundamental rights. Indeed, as Veldman remarks, 'the methods applied by the ECtHR and the [CJEU] start out from opposite directions'. While the ECtHR adopts a two-stage approach, asking whether there has been an interference with fundamental rights, and then, whether it can be justified, taking a strict approach to potential derogations; the CJEU requires fundamental rights to defend themselves against *prima facie* breaches of free movement, also taking a restrictive approach to justifications.[295] Arguably, then, when Union accession to the ECHR eventually occurs, it will necessitate a shift in the Court's adjudicative processing of conflict between free movement and fundamental rights. Thus, Dorssemont speculates that accession 'will force the European institutions to justify restrictions to citizens' rights, instead

[292] Barnard, Deakin, n.8
[293] Case C-515/08 *Santos Palhota* n.23, relying, in particular on Art.9 TFEU and Art.3(3) TEU, n.23, paras.51-55; see also AG Trstenjak, Case C-271/08 *Commission v Germany*, n.23. These Opinions will be considered further in the discussion of alternatives to the breach/justification approach in ch.5
[294] Admittedly, since the CJEU declared the Draft Agreement on the EU's Accession to the ECHR to be incompatible with the EU Treaties, in *Opinion 2/13* (n.62), accession would appear far from imminent.
[295] Veldman, n.9, 113; see also Mason, n.277, 146-147.

of forcing citizens to justify the exercise of their human rights'.[296] Of course, this reflects a wider issue with the adjudicative architecture for addressing tensions between the market freedoms and fundamental rights, which remains problematic within the Union's contemporary constitutional framework even in those cases where there is no breach of Convention minimum standards. Accordingly, the below consideration of the compatibility of the CJEU's adjudicative approach with the requirements of the ECHR simply serves as one useful illustration of this broader concern.

An area of particular interest within the literature has been the compatibility of the CJEU's *Laval* quartet, concerning the rights to collective bargaining and collective action, with the recent case law of the ECtHR in this field. Accordingly, this offers a useful case-study to assess the CJEU's current approach against the EU's future constitutional obligations post-accession. It will be argued that the decisions of the ECtHR in *Demir* and *Enerji*[297] indicate that a modification to the CJEU's adjudicative methodology would be advisable in order to avoid 'a high noon conflict' with the ECtHR,[298] even in light of the ECtHR's more cautious recent judgment in *National Union of Rail, Maritime and Transport Workers (RMT) v UK* (hereinafter, *RMT)*.[299]

In *Demir*, a Turkish municipality had failed to meet some of the obligations arising out of a collective agreement it had made with a trade union, representing civil servants. Proceedings brought by the trade union before the Turkish courts failed on the basis that trade unions representing civil servants had no legal personality and no power to enter into collective agreements under Turkish law. This was challenged, before the ECtHR, as a violation of Article 11 ECHR, which provides individuals with the right to form and join trade unions for the protection of their own interests. The Strasbourg Court decided that denial of the trade union's legal personality was a violation of Article 11. Crucially, in a departure from its previous case-law,[300] the ECtHR also held that collective bargaining constituted an 'essential element' of that provision. Since Turkey had failed to demonstrate why its refusal to

[296] F. Dorssemont, 'How the European Court of Human Rights Gave Us *Enerji* to Cope with *Laval* and *Viking*' in Moreau, ch.14, n.8, 231. However, the need to ensure that fundamental rights are defined according to the framework of the structure and objectives of the EU as an autonomous legal order was prevalent in the CJEU's recent rejection of the Draft Agreement on the EU's Accession to the ECHR in *Opinion 2/13*, n.62, para.170
[297] N.240; *Enerji Yapi-Yol Sen v Turkey* App.no:68959/01
[298] Ewing, Hendy, n.9, 4
[299] App.no:31045/10
[300] *Schmidt and Dahlström v. Sweden* App.no:5589/72; *National Union of Belgium v Belgian Police* App.no:4464/70

recognise the collective agreement was 'necessary in a democratic society' its activity could not be justified. This outcome is significant for two reasons. First, the requirement that Turkey justify its conduct provides an example of the two-stage fundamental rights bias in the adjudicative approach of the ECtHR. Second, by holding that the right to collective bargaining constituted an *essential element* of Article 11, the Strasbourg Court raised the standard of fundamental rights protection required of the Contracting Parties by that provision.

However, the question of whether the right to collective action was also an essential element of Article 11 was not addressed in *Demir*. The answer (appeared at least) to come with the Court's subsequent decision in *Enerji*. Members of a trade union challenged, as a violation of Article 11 ECHR, sanctions imposed on them for participating in strike action, contrary to a ban imposed on public sector workers by the Turkish authorities. The Strasbourg Court highlighted that that Article requires Contracting Parties to permit trade unions to strive for the interests of their members. Strike action was '*un aspect important*' of trade union activity in this regard. It noted also that the right to strike was recognised by the governing bodies of the International Labour Organisation (ILO) as '*le corollaire indissociable*' of the right of trade union freedom protected by ILO Convention No.87. The ECtHR concluded that there had been an interference with the rights enjoyed pursuant to Article 11.[301] It then proceeded to its usual proportionality assessment. In light of the fact, *inter alia*, that the circular applied to *all* civil servants without distinction, the interference with Article 11 ECHR could not be justified.[302]

Demir and *Enerji* elicited a considerable response from commentators in relation to their potential effects on *Viking* and *Laval*. Veldman argued that the ECtHR and the CJEU were 'likely to head for clash in respect of the fundamental right to strike once the EU accedes to the ECHR',[303] while Ludlow considered the cases 'fundamentally irreconcilable'.[304] The Strasbourg Court's reliance on international labour law standards is of particular interest since the ILO's Committee of Experts, in its 2010 report, explicitly stated that the approach of the CJEU in *Viking* and *Laval* was 'likely to have a significant restrictive effect on the exercise of

[301] Para.24
[302] Paras.31-34
[303] Veldman, n.9, 115-116; see also, Ewing, Hendy, n.9, 40-42
[304] Ludlow, n.257, 121

the right to strike in a manner contrary to the [ILO] Convention'.[305] Certainly, a legal order that respects the right to strike only where it is exercised in a way least restrictive of the fundamental economic freedoms of the employer is unlikely to conform with the status of the right to strike as an 'essential element' of Article 11 ECHR. As Ewing and Hendy point out, '[i]t was not necessary…for the ECtHR to consider whether the other means by which the union might be heard on behalf of its members were sufficient: breach of the right to strike alone was a breach of Article 11(1)'.[306]

However, writers also acknowledged, in the midst of their enthusiasm, that the ECtHR's reference to the right to strike as '*le corollaire indissociable*' of collective bargaining, in *Enerji*, related to discussion of the views of the governing bodies of the ILO. The ECtHR, when speaking for itself, 'was slightly more timid in tone'[307] referring to the right to strike as 'just' an important measure to protect workers' interests.[308] Dorssemont went as far as to argue that since *Demir* and *Enerji* involved total bans on collective bargaining and action rather than conflicting rights and freedoms, they 'do not provide sufficient guidance to predict anything whatsoever'.[309] The recent case of *RMT* has, to some extent, confirmed these reflections.

RMT was a trade union that argued, before the Strasbourg Court, that UK rules, prohibiting secondary strike action, were in violation of Article 11 ECHR. Having established that the ban was indeed an interference with the freedom of association, the ECtHR progressed to the standard questions asked at the justification stage. RMT argued that the prohibition could not be viewed as pursuing the 'lawful aim' of 'protecting the rights and freedoms of others' since the very purpose of strike action was to induce the employer to meet the demands of labour. Distinguishing its previous case of *UNISON*,[310] in which the ECtHR had held that this could constitute a legitimate aim, that Court nevertheless, considered the UK measures to pursue a legitimate purpose, making no comment as to the future applicability of *UNISON*.[311] RMT argued, in addition, that the UK government's actions could not be viewed as necessary.

[305] Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), ilolex nr 062010GBR087, 209
[306]Ewing, Hendy, n.9, 14
[307] Ludlow, n.257, 129
[308] Dorssemont, n.296, 225-226.
[309] Ibid
[310] *UNISON v United Kingdom*, App.no:53574/99
[311] Paras.79-982

Relying on the Court's use of the phrase 'indispensable corollary' in *Enerji*, RMT argued that the right to strike was an 'essential element' of Article 11. Thus, its restriction would impair 'the very essence' of the freedom of association. The ECtHR disagreed, stating that it had only used that term when adverting to the position of the ILO supervisory bodies. *Enerji* was not authority for the privileged status of the right to strike but simply illustrated that strike action was clearly protected by Article 11(1) ECHR.[312] The Strasbourg Court considered that RMT had been able to exercise two of the essential elements of Article 11: the right to seek to persuade the employer to hear it and the right to engage in collective bargaining.[313] It also highlighted the need to strike a fair balance between the competing interests of individuals and the community as a whole. The margin of appreciation in *Demir* had been narrow because the dissolution of a trade union and non-recognition of a collective agreement went to the inner core of Article 11. However, this could not be read as 'narrowing decisively and definitively the domestic authorities' margin of appreciation in relation to regulating, through normal democratic processes, the exercise of trade union freedom within the social and economic framework of the country concerned'.[314] The democratic institutions of the Contracting Parties were generally better-placed than the international judge to decide which measures best suited the conditions in their country. Nevertheless, the Court did state that the removal of strike action altogether would '[strike] at the very substance of trade union freedom'.[315]

In an Opinion that concurred with the substantive outcome of the case, Judge Wojtyczek made explicit reference to *Viking* and *Laval*. He noted, seemingly without concern, that 'trade unions may be held liable for strikes which interfere with the fundamental freedoms protected by European law'. He also remarked that, while the 'right to strike was protected under the Charter, that instrument did not entitle the European Union to prevent its Member States from imposing restrictions on the right to strike'.[316] However, he made no causal link between this and the requirement that fundamental rights issue must fall within the scope of Union law, or the division of competences in relation to the right to strike contained in Article 153(5) TFEU.

[312] Para.84
[313] Para.85
[314] Para.86
[315] Para.98
[316] Para.6

Without doubt, *RMT* lessens the potential impact of *Demir* and *Enerji* on the treatment of the right to strike within the EU legal order. If the right to strike is not '*le corollaire indissociable*' of a trade union's Article 11 rights, then it is less clear that the requirement that trade unions pursue means less restrictive of free movement will violate that provision. Trade unions still have access to the 'essential elements' of Article 11: they remain generally able to enter into collective agreements; can seek to persuade employers to listen to them; and can strive to protect their members' interests. Indeed, trade unions explicitly have the right to strike, pursuant to Article 28 CFR and acknowledged by the CJEU in *Viking* and *Laval*. The ECtHR's acceptance that the right to strike has to be balanced against 'the rights and freedoms of others' suggests that the Strasbourg Court would not find the application of some kind of proportionality test within the EU legal order problematic. More broadly, in relying on the judgments of the Luxembourg Court for his own conclusions, Judge Wojtyczek seemingly views the CJEU (for now, at least) as a parallel overseer of fundamental rights, as opposed to a regional polity that might itself fail to meet international standards. Finally, the deference of the ECtHR in *RMT*, to policy decisions reached by domestic authorities better-placed than the international judge to decide which conditions best suit its needs, suggests a potentially broad margin of appreciation for the CJEU on free movement issues post-accession. Currently, the ECtHR only faces the question of whether one Contracting Party's law and policy meet the minimum standards required by the Convention. By contrast, as detailed in section 4.1, in cases like *Familiapress*, or even *Viking* and *Laval*, the CJEU has to reconcile competing Member State visions of fundamental rights protection, which clash as a direct result of free movement, and measure these also against the centrality of the internal market to the EU legal order. While certain substantive outcomes might be criticised, there is no questioning the CJEU's extensive experience in this field, nor the inexperience of the ECtHR. Thus, post-accession, the ECtHR might offer a broad margin of appreciation to the EU, and therefore the CJEU, in resolving conflict between free movement and fundamental rights. The CJEU is arguably better-placed to understand the complex social and economic needs arising out of the creation of an internal market.

This introduces the related question of the ongoing application of the *Bosphorus* principle post-accession.[317] It is arguably unlikely that even cases as controversial as *Viking* and *Laval* would be viewed as examples of 'manifestly deficient' fundamental rights protection on the

[317] *Bosphorus v Ireland* App.no:45036/98

part of the EU. On the other hand, Craig has argued that 'there is no rationale' for the maintenance of the rule in *Bosphorus* after the EU formally accedes to the ECHR since it should be treated like any other signatory state.[318] Moreover, in cases concerning competing Member State fundamental rights definitions, the ECtHR would not have to concern itself with which one the CJEU should have preferred, but rather with whether the substantive outcome of a given case meets minimum Convention standards. If it does not, then the EU should still be found to have violated the relevant ECHR provision. Further, the deference that the ECtHR shows the United Kingdom in *RMT* related, partly, to the fact that limitations placed on fundamental rights were the outcome of a democratic process. This has much less relevance in relation to those decisions of the CJEU that seem to favour free movement over the fundamental rights policies formulated by the democratic organs of the Member States.[319]

Indeed, *RMT* might not limit the effects of *Demir* and *Enerji* as much as first appears. First, regardless of the status of the right to strike as an 'essential element' of Article 11 ECHR, it still falls within the protective scope of that provision. Interferences must therefore still overcome the justificatory hurdles imposed by Article 11(2). Accordingly, there remains a systems clash between the fundamental rights-bias of the ECtHR's two-stage framework, and the preference for free movement inherent in the approach of the CJEU. More broadly, we have only examined *Demir*, *Enerji*, and *RMT* as a case-study of the current incompatibility between the ECtHR and CJEU adjudicative models. When set against *all* of the Convention rights, it is entirely possible that the pursuit of free movement might interfere with the 'essential elements' of some of those provisions.[320] In any case, issues of compliance with the ECHR are not the only problems arising from the current two-stage breach/justification framework of the CJEU. It will be recalled that future accession to the Convention is just one example of constitutional developments within the Union legal order that call into question the suitability of the CJEU's adjudicative methodology.

Returning to *RMT*, the ECtHR explicitly stated in that judgment that a total ban on the right to strike would 'strike at the very substance of trade union freedom'. Arguably, the CJEU's

[318] P. Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance', (2013) 36 Fordham Int'l LJ 1114, 1140-1141. C.f. C. Timmermans, 'The Relationship between the European Court of Justice and the European Court of Human Rights', in Arnull et al, n.262, 152, 156

[319] See s.4.2.

[320] Judges Ziemele, Hirvelä and Bianku, in *RMT*, suggested (perhaps contentiously) that there would be a narrower margin of appreciation in relation to civil and political rights, 'the protection of these rights being the very purpose of the Court's creation', para.2

interpretation of the Posted Workers' Directive in *Laval* imposes a total ban on the right to strike in key areas of worker protection. Specifically, trade unions are precluded from taking collective action to strive for standards of worker protection higher than or beyond those referred to in the 'core nucleus' of Article 3(1)(a)-(g) PWD. As Veldman argues, '[e]xaminations by the judiciary of a sufficient cause for the action prove…problematic because they could amount to unlawful interference with the right to collective action itself'.[321] The *BALPA* saga also suggests that the uncertainty surrounding *Viking* and *Laval* has led to a *de facto* ban on strike action in some situations.[322] British Airways (BA) sought an injunction against the strike action of the British Air Line Pilots' Association (BALPA), concerning the setting-up of a subsidiary in another Member State, on the grounds that it would breach BA's free movement rights, pursuant to *Viking* and *Laval.* Ewing and Hendy consider that the complexity of those cases and the associated costs of strike action will result in interim injunctions against strikes in most future cases.[323] BALPA withdrew its application for a court declaration determining the '*Viking* question' since this was likely to take many months, by which time the subsidiary would already be established. It could not risk strike action during this time because BA sought unlimited damages in that regard. Ewing and Hendy find it difficult to see how the constraints on the right to strike described above can be consistent with Article 11 ECHR. They argue also that the spectre of unlimited damages 'imperils the very existence of a trade union for taking what is no more than trade union action'.[324] More generally, *RMT* does not diminish the status of the right to bargain collectively as an 'essential element' of trade union freedom. Accordingly, there is still a clash between *Demir* and the decisions of the CJEU in *Rüffert* and *Commission v Luxembourg*. It will be recalled that in those cases, collective agreements going beyond the core nucleus of the PWD, signed by public authorities, were rendered inapplicable as a result of the restrictions they placed on the free movement rights of service providers coming from other Member States.

In light of this evidence of conflict between the methodologies of the ECtHR and CJEU, Ludlow has suggested that '…since head-on conflict and direct review of the CJEU's jurisprudence by the ECtHR might be best avoided, accession to the ECHR might prompt the CJEU itself to make better use of the plentiful space that already exists within the EU law

[321] N.9, 115
[322] See Ewing, Hendy, n.9, 44-47
[323] Ibid
[324] Ibid

framework for a more careful balancing of economic and social rights.'[325] Nevertheless, there are some weaknesses in the ability of the ECHR to provide a suitable framework for addressing fundamental rights tensions arising within the Union legal order. Specifically, the ECHR generally only protects civil and political rights, with more programmatic economic and social rights located in protocols, protected through a generous interpretation of civil and political rights, or not included at all. Here, while accession to the ECHR might still push for *general* change in adjudicative methodology, it is unlikely to be of use to citizens in individual cases. Similarly, the ECHR will not act as a check on the CJEU where EU fundamental rights definitions comply with the Convention minimum but do not meet the idiosyncratic fundamental rights needs of the Member States. For instance, the Scandinavian social model relies on a strong right of collective action to regulate working life. In these instances, however, the EU Charter might plug the gap and act as a constitutional driver of adjudicative change: first, through the modernised catalogue of rights that it contains, and second, via its reinforced requirement that the Union draws on the common constitutional traditions of the Member States. It is to the potential influence of the Charter that we now turn.

4.3.2.3. The primary status of the EU Charter: requiring a new approach to conflict between free movement and fundamental rights?

The primary law status enjoyed by the Charter post-Lisbon, pursuant to Article 6(1) TEU, calls for modification of the Court's methodological approach to clashes between free movement and fundamental rights for a number of reasons. First, like the ECHR, the Charter contains an inherent fundamental rights-bias to which the Court's current adjudicative breach/justification procedure is ill-suited. Second, while the Convention has always been a source of 'particular inspiration' for EU fundamental rights, Article 52(3) CFR expressly stipulates that Charter rights shall be given the same meaning as those in the Convention, where they correspond, except where the Charter offers more extensive protection. Third, the Charter indicates a fundamental shift in the central objectives of the Union, rendering an

[325]Ludlow, n.257, 136. Although, again, the focus of the CJEU in *Opinion 2/13* (n.62) was on the need to ensure that fundamental rights were defined in accordance with the framework of the structure and objectives of EU law, para.170.

adjudicative architecture that places other values and interests 'after' free movement inappropriate.

Pursuant to Article 52(1) CFR restrictions on Charter rights must overcome well-known justificatory hurdles, such as proportionality and necessity. Thus, like the ECHR, the adjudicative structure for clashes between fundamental rights and other law and policy, under the Charter, is the inverse of that used by the CJEU when free movement clashes with fundamental rights. Indeed, within the case-law on the validity of EU legislative acts, the CJEU consistently works through a two-stage process that asks, first, whether the instrument breaches fundamental rights, and, second, whether it can be justified.[326] Against this background, an adjudicative model which would require Charter rights to justify themselves against restriction on free movement, appears, *prima facie*, to be fundamentally incompatible with Article 52(1) CFR.

However, in this respect, it is important to note that free movement also features in the Charter. Its preamble pledges to 'ensure free movement of persons, services, goods and capital, and the freedom of establishment'. Article 45 CFR provides every citizen of the Union with 'the right to move and reside freely within the territory of the Member States'. Article 15 CFR stipulates that 'every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State'. Thus, at least the free movement of citizens, workers, service providers, and the self-employed, potentially including larger businesses, enjoy free movement as a right under the Charter itself. Although it is less clear whether the Charter protects the free movement of goods and capital, some commentators have posited that the Charter covers all of the freedoms.[327] Others have argued that capital and goods fall within the Charter provisions on the freedom to conduct a business and the right to property,[328] or can be viewed as vital to the effective exercise of personal free movement rights by Union citizens.[329] This suggests that the fundamental rights-bias inherent in Article 52(1) CFR cannot be applied to the free movement provisions since they, themselves, feature in the Charter.[330] Nevertheless,

[326] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, n.280; Joined cases C-92/09, C-93/09 *Volker und Markus Schecke and Eifert* [2010] EU:C:2010:662
[327] Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles', (2001) 38 CMLRev 1201, 1209
[328] Arts.16 and 16 CFR; Trstenjak, Beysen, n.10, 309-310
[329] T. Horsley, *'Death, Taxes and (Targeted) Judicial Dynamism: The Free Movement of Capital in EU Law'*, in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, (OUP, forthcoming), ch.23
[330] Dorssemont, n.296, 230-231

the Charter would seem, at least, to require an adjudicative model that would treat them equally.

And yet, pursuant to Article 52(2) CFR, Charter rights 'for which provision is made in the Treaties, shall be exercised under the conditions and within the limits defined by those Treaties'. This has led Veldman to conclude that 'it is doubtful that the Charter will shed any new light on the [*Viking* and *Laval*] matter'.[331] In other words, Article 52(2) might suggest that the existing adjudicative model operating in relation to the free movement provisions is to be transported into the Charter framework. However, it is submitted that Article 52(2) can be read simply as emphasising the availability of the extensive, substantive potential justifications for restricting free movement that exist pursuant to Articles 36, 45(3), 52(1), and 65(1) TFEU, and the mandatory requirements, although these do not explicitly feature in the Charter itself. Moreover, as section 4.3.1 demonstrated, the structure of the Treaty does not actually require a two-stage approach.

Similarly, Article 28 CFR protects the right to collective bargaining and collective action 'in accordance with Union law'. This arguably defines the right to strike by reference to the obligations arising under free movement, including the requirement in *Viking* and *Laval*, that trade unions organise collective action in a way that is least restrictive of free movement. This can be mitigated by the requirement, arising from Article 52(3) CFR, that, for instance, Article 28 CFR has to be given the same meaning as Article 11 ECHR, unless the Union offers more extensive protection. Consequently, although the right to collective bargaining must be defined 'in accordance with Union law', Union law itself must respect the right to collective bargaining as defined by the Convention. Further, while the ECtHR (currently) operates an 'equivalence' principle with respect to EU fundamental rights standards, pursuant to the *Bosphorus* ruling, the Charter would appear to oblige the CJEU to follow the clear case-law of the ECtHR when defining relevant rights under the Charter.[332] Given the probable clash between *Demir* and *Enerji*, and *Viking* and *Laval*, this should prompt the Luxembourg Court to reconsider its rulings.

[331] N.9, 116
[332] Case C-400/10 *J.McB v LE* [2010] EU:C:2010:582, para.53; K. Lenaerts, 'The Charter and the Role of the European Courts', (2001) 8 MJECL 90, 99; Craig, n.318, 1149

Although the bestowal of primary law status on the Charter does not give the Union new powers to attain the rights therein,[333] it encourages a shift in the core objectives of the EU. Accordingly, when the Union pursues policy within its competence, such as free movement, it must not value these *over* the fundamental rights that the Charter obliges it to respect. The significance of the Charter's extension of fundamental rights protection beyond the ECHR to include economic and social rights and rights of the third generation, such as the need for a high level of environmental protection[334] also strongly implies the need for the Member States to be given adequate legal space to perform their fundamental rights functions, where the Union lacks the relevant legislative competence. These requirements call into question the suitability of an adjudicative framework that can only process such activity as a 'defence' against a *prima facie* wrongful breach of the free movement provisions. As Nic Shuibhne summarises, the binding status of the Charter 'is a critical factor in the apparent conceptual shift towards greater legal recognition for values and interests traditionally positioned 'after' free movement objectives'.[335]

This subsection has demonstrated that the CJEU's current approach to resolving tensions between free movement and fundamental rights does not meet the contemporary needs of the Union constitution. Specifically, it has not adapted to the evolution of the Union from economic community, focused almost exclusively on the creation of a common market, to a political union with express responsibility for policy fields beyond economic integration. Nor has the CJEU's adjudicative model adapted to the Treaty's explicit commitment to respecting fundamental rights, introduced as far back as Maastricht, but concretised by Lisbon's conferral of primary status on the Charter and its requirement that the EU accede to the ECHR. Moreover, in several areas, that cannot be cleanly delineated from free movement, thinking particularly of social policy, the Treaty has elected to respect the diversity of the Member States and make them agents in pursing the Union's new objectives. This requires the Court to leave adequate judicial space for the Member States to perform this function, which the two-stage model does not achieve.

5. Conclusion

[333] Art.51(2) CFR makes this clear
[334] Art.37 CFR
[335] Nic Shuibhne, n.44, 50

The *Viking* and *Laval* judgments sparked concern from an appreciable section of the academic commentary that the fundamental right to strike was subjugated to the freedoms of establishment and services respectively, in those cases. Writers have noted the potentially problematic use of a two-stage breach/justification methodology by the CJEU, whereby it establishes, at stage one, a *prima facie* breach of free movement.[336] At stage two, the onus is on fundamental rights to *justify* this pre-determined wrongful conduct, by reference to questions of appropriateness and necessity under the principle of proportionality. This offers a procedural advantage to free movement over fundamental rights. However, the chapter emphasised that the two-stage approach has long been the standard methodology of the Court and had already been adopted for interactions between free movement and fundamental rights, prior to *Viking* and *Laval*. Accordingly, in setting the parameters of this thesis, the chapter highlighted the necessity of demonstrating *how* the two-stage framework came to be the Court's dominant method of adjudication, *why* it is problematic in the context of interactions between free movement and fundamental rights, and *how* it can be overcome. In exploring overarching themes in this regard, the chapter argued that the two-stage model emerged from the historical centrality of free movement to achieving the core aim of the EEC, namely the creation of an internal market. In the context of clash between the Treaty's market freedoms and protectionist Member State rules, a structural preference for free movement was a logical means of ensuring that it was able to tackle precisely the type of conduct that the Member States had agreed to eradicate when they formed the EEC. Crucially, contact between free movement and fundamental rights within this limited framework was unlikely. Indeed, the Rome Treaty made no provision for the protection of fundamental rights. Accordingly, the safeguarding of fundamental rights within the Union legal order has been more piecemeal, emerging out of the growing appreciation that the internal market could not operate in isolation from fundamental rights issues. Significantly, although the need to respect fundamental rights is now explicitly recognised by Union primary law, this historical asymmetry has resulted in fundamental rights law, policy, and activity being slotted into the pre-existing two-stage breach/justification model used to adjudicate clashes between free movement and competing public interests. In this context, free movement is procedurally presented as more fundamental than fundamental rights.

[336] N.17

The chapter acknowledged that there is evidence in the case-law of fundamental rights prevailing over free movement, despite being processed through the two-stage framework. This has led some to question whether the Court distinguishes substantively between different types of fundamental rights, for instance on the basis of whether they are civil and political, or economic and social in nature.[337] However, the existence of examples in which fundamental rights have overcome the structural bias inherent in the Court's approach does not, of itself, demonstrate that the CJEU's methodology is not problematic in cases where free movement prevails. In any case, where fundamental rights win out in the final analysis this is *in spite of* not because of the imbalanced adjudicative framework, which presents fundamental rights as 'derogations' from free movement, to be interpreted 'strictly'. This can undermine fundamental rights in a practical sense, since it underappreciates the peculiarities of certain Member States' fundamental rights requirements, the inherently restrictive nature of some rights, or the practical considerations attached to protecting others. The chapter also demonstrated that presenting fundamental rights as derogations from free movement is problematic from theoretical perspective, particularly if fundamental rights are viewed as universal, a-political absolutes that should trump conflicting public interests. Even if we accept the legal reality that fundamental rights are frequently defined and/or restricted by their political environment, they exist as a social fact within the Union legal order. Accordingly, a procedural preference for free movement, over fundamental rights, is ill-suited to the EU's contemporary constitutional framework, which not only claims to respect fundamental rights within its primary law, but also, post-Lisbon, confers primary law status upon the Charter and obliges the Union to accede to the ECHR.

The finding that the two-stage approach does not meet the needs of the Union's contemporary constitution provokes the pertinent questions of why it remains the Court's predominant methodology and what alternative adjudicative approaches might better suit the EU's present-day constitutional requirements. In chapters two, three, and four, this thesis makes a significant contribution in this regard by conducting an essential diagnostic analysis of why the breach/justification framework has been retained for addressing conflict between free movement and fundamental rights by reference to the overlapping 'constitutional trinity' of developments, namely the expansion in the scope of free movement, the recognition of the direct effect of the market freedoms, and the introduction of Union citizenship. Chapter five

[337] O'Gorman, n.110; Malmberg, Sigeman, n.142

then tests the proposed alternative of balancing against practical and conceptual concerns, demonstrating how they can be overcome.

Chapter Two

EXPANDING THE MATERIAL AND PERSONAL SCOPE OF THE FREE MOVEMENT PROVISIONS: EXPLORING THE IMPACT ON FUNDAMENTAL RIGHTS

1. Introduction

As chapter one underlined, the core aim of the EEC was economic integration between the Member States through the creation of a common market. In order to achieve this, the Rome Treaty recognised the need for, *inter alia*, the free movement of goods, workers, services, establishment and capital across intra-EU borders.[1] The main tool for the achievement of a common market via these market freedoms was arguably the principle of non-discrimination. For instance, the protection of domestic commodities from foreign trade through, for example, the imposition of quotas on goods coming from another Member State or a refusal by Member State A to employ workers from Member State B would be the antithesis of a common market and was accordingly prohibited by Articles 30 and 48(2) EEC, respectively.[2] The Treaty acknowledged that there would be some situations where discrimination between Member States might be necessary, not for reasons of protectionism but, for instance, to deal with issues of public health.

However, in the following decades, the CJEU progressively extended the scope of the free movement provisions to acknowledge that the attainment of a common market can also be inhibited by law, policy, and activity that is not directly discriminatory in nature. Since the aim of the EEC was economic integration, this evolution within free movement was, arguably, an understandable one. Yet this gradual expansion of what constitutes a breach of free movement has direct consequences for the protection of fundamental rights. It is this phenomenon with which this chapter is concerned. As section two explores, the steady extension of the material scope of the free movement provisions, from questions of direct discrimination to a market access test, and the expansion of its personal scope has inevitably

[1] Arts.2, 3(a) and (3)(c) EEC
[2] The principle of non-discrimination is equally visible in Art.52 EEC (establishment); Art.60 EEC (services); and Art.67 EEC (capital).

caused the free movement provisions to interact with new areas of national law and policy. Frequently, these rules have only incidental or oblique (though sometimes, admittedly, significant) effects on the internal market, existing primarily to pursue other Member State objectives. Crucially, such Member State policy can represent attempts to protect fundamental rights. For example, in *Dynamic Medien,* the German rule requiring digital media to be assessed by a German classification body and its packaging to feature an age-label did not directly discriminate against foreign videos/DVDs but existed to protect the rights of the child.[3] However, in section three, this chapter will posit that the historical focus on eliminating protectionist behaviour has supported the adoption and maintenance of the imbalanced two-stage breach/justification model, for the adjudication of clashes between free movement and conflicting activity, described in chapter one. It will be recalled that this offers a significant structural advantage to free movement. Critically, while this procedural prioritisation of free movement might be viewed as logical in the context of protectionist policy, which strikes at the heart of what the internal market is trying to achieve, the section will demonstrate that it is unsuitable for the new types of free movement dynamics that have emerged in light of its expansion, especially those concerning fundamental rights. In particular, the section will develop the argument, outlined in chapter one, that the focus, at the justification stage, on finding ways of protecting fundamental rights that are less restrictive of free movement, triggers a 'trio of impact', in relation to the protection of fundamental rights. Specifically, it reduces the legal space for considering the idiosyncratic rights needs of the Member States, caused, for instance, by the language spoken in a particular Member State, which might require a specific approach to consumer protection. It also limits appreciation of the inherently restrictive nature of certain rights, such as the fundamental right to strike, or the complexity of designing programmes for the protection of fundamental social rights. And yet, as the section will demonstrate, the expansion of the material and personal scope of free movement has also served to concretise the two-stage approach, simultaneously lowering the evidential burden at the breach phase and raising it at the justification stage.

As a definitional point, it will be recalled from chapter one, that the thesis takes a broad approach to fundamental rights, incorporating rights of a civil, political, economic and social nature, but also including the third generation 'solidarity rights', such as the protection of health, the environment, and consumers. Accordingly, the term captures many of the well-

[3] Case C-244/06 *Dynamic Medien* [2008] EU:C:2008:85

established derogations from the free movement provisions contained in the Court's mandatory requirements case-law. Although this terminological breadth might be contentious to some, this sites our study of fundamental rights usefully within a wider comment on the outer limits of the internal market. If, as chapter one argued, fundamental rights serve to shine a spotlight on the special commitments of a State/polity, then they highlight pertinent questions about when the Court should act and when it should hold back in the internal market context.

2. Increasing the interaction between free movement and fundamental rights: a consequence of an expansion in the material and personal scope of the free movement provisions

This section charts the expansion of the material and personal scope of the free movement provisions from a fundamental rights perspective. This thematic approach dictates that the discussion will be broadly but not wholly chronological. Specifically, it will demonstrate that the evolution of the tests for establishing a breach of free movement, from direct discrimination through to market access, and the broadening of key definitional terms within the free movement provisions, has increased the volume of interactions between free movement and fundamental rights. This sets the factual scene for section three to examine the influence of these historical definitional developments on the rights-restricting methodology for adjudicating new free movement/fundamental rights dynamics.

2.1. From distinctly applicable measures to market access: the expanding material scope of the free movement provisions - a direct contributor to growing interactions between free movement and fundamental rights

This subsection will focus on the direct contribution that the extension of the material scope of the free movement provisions has made to the frequency of their interactions with fundamental rights. In covering one of the most significant developments in Union constitutional law, the chapter will inevitably touch upon existing debates concerning the material expansion of free movement. For instance, there is a rich literature surrounding the question of whether dual regulatory burdens exist as a type of indirect discrimination, or form

a separate category beyond discrimination;[4] whether a finding of a breach of free movement reveals protectionist intent or simply protectionist effects;[5] and whether, within the free movement of goods, the market access test operates as the overarching, defining principle of that freedom,[6] or merely a residual category of restriction.[7] It is beyond the scope of this work to examine those issues in any detail, although they will be referred to where relevant to our specific examination of the interaction between free movement and fundamental rights. However, owing to the existence of these ongoing questions, it remains necessary to define, as far as is possible, key terms for the purposes of this chapter.

The term 'distinctly applicable' will refer to measures that make an explicit distinction between the treatment of domestic factors of production and comparable foreign Member State commodities. In other words, here, we are concerned with law, policy and activity that directly discriminate between national and non-national Member State trade. 'Indistinctly applicable measures' concern rules that apply, on their face, equally to domestic and foreign trade but either discriminate in fact because their requirements are more easily met by home State workers/producers/companies/providers, or impose extra burdens on foreign Member State trade who have to meet these conditions *in addition to* obligations already imposed on them by their Member State of origin. This latter phenomenon is the so-called dual regulatory burden (DRB). 'Market access' relates to rules that apply equally to domestic and foreign commodities and do not indirectly distinguish between them in the ways described above. Nevertheless, their very existence is said to constitute a breach of free movement because it restricts access to a market place operating within the Union.

2.1.1. A study of distinctly applicable measures in which interactions with fundamental rights are limited but possible

As section one noted, the clearest obstacle to economic integration is the existence of protectionist Member State rules. Consequently, a central aim of the Rome Treaty was to eradicate rules that protect domestic factors of production from competition from outside,

[4] N. Bernard, 'Discrimination and Free Movement in EC Law' (1996) 45(1) ICLQ.82; C. Hilson, 'Discrimination in Community Free Movement Law', (1999) 24(5) ELRev 445
[5] Ibid
[6] Opinion of AG Jacobs in Case 412/93 *Leclerc-Siplec* [1995] EU:C:1995:26, paras.38-45; S. Weatherill, 'After Keck: Some Thoughts on How to Clarify the Clarification', (1996) 33 CMLRev 885
[7] J. Snell, 'The Notion of Market Access: A Concept or a Slogan?', (2010) 47 CMLRev 437

comparable, commodities. Such measures would be directly opposed to the common market ideal that the Member States agreed to work towards when the EEC was formed. Protectionism often manifests itself in distinctly applicable rules. For instance, a rule in Member State A that employers on its territory must give preference to its nationals when seeking labour, directly discriminates against workers coming from other Member States and would seem, *prima facie*, to reflect a protectionist agenda. Accordingly, references to discrimination feature or have featured in provisions covering all of the free movement provisions[8] and the Court has consistently found directly discriminatory provisions to constitute restrictions on free movement.[9]

The Treaty does recognise that even distinctly applicable Member State rules might, in some instances, exist to meet legitimate Member State endeavours not directly targeted at protecting domestic trade. Thus, for instance, Article 52(1) TFEU allows Member States to derogate from the freedom of establishment for reasons of public policy, public security or public health. Articles 36, 45(3), 62 and 65(1)(b) TFEU makes similar provision in relation to the free movement of goods and workers, the free provision of services, and the free movement of capital, respectively.[10] Nevertheless, the Treaty obligation to dismantle barriers to intra-State movement arguably necessitates a reconsideration of *how* public policy objectives are to be achieved, where in the past they might have been pursued through directly discriminatory means. This has invited a strict approach to derogations from the Court. For instance, in *Reyners*, the CJEU held that a Belgian rule limiting the profession of *avocat* to Belgians was in breach of the freedom of establishment because it was possible to separate aspects of the

[8] Regarding Art.34 TFEU, this is arguably implicit in that provision's focus on quantitative restrictions on *imports*. Moreover, Art.36 TFEU, imposes the condition that derogations from the free movement of goods do not constitute arbitrary discrimination. Arts.45, 49 and 56 TFEU, on workers, establishment, and services respectively all either prohibit discrimination or require equal treatment. Art.63 TFEU, concerning capital, states, more broadly, that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. However, Art.63(1)(b) makes a specific reference to discrimination at the justification stage. Moreover, original Art.67 EEC explicitly featured discrimination. Nic Shuibhne argues that, although they mention discrimination, none of the free movement provisions *require* it: *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Court of Justice*, (OUP, 2013) 190. Nevertheless, our focus is on the historical centrality of discrimination to defining a breach of the free movement provisions, from a fundamental rights perspective. Indeed, Nic Shuibhne notes that, while the Treaty only requires restrictions, 'in reality…most of the national measures reviewed by the Court *did* involve…directly discriminatory measures', 195

[9] Case 2/74 *Reyners v Belgium* [1974] EU:C:1974:68; see also Case 249/81 *Commission v Ireland* [1982] EU:C:1982:402; Case 44/72 *Marsman v Rosskamp* [1972] EU:C:1972:120; Case 15/69 *Württembergische Milchverwertung Südmilch AG v Ugliola* [1969] EU:C:1969:46

[10] Although Art.36 contains a lengthier list of permissible derogations from goods and Art.65(1)(b) offers some justifications specific to capital movement.

role linked to the exercise of official authority, which might be limited to Belgian nationals, from the general tasks of an *avocat*.[11]

The underlying objective of this approach is arguably to ensure that domestic pursuit of public policy goals is not arbitrarily discriminatory. Indeed, such an approach to policy objectives is not permitted under the Treaty provisions allowing derogations from free movement.[12] Nevertheless, assessment of the proportionality of national law and policy is broader in nature, focusing on whether endeavours can be achieved in a way less restrictive of free movement generally.[13] Accordingly, this strict approach to derogations from free movement carried the latent risk that a restrictive approach to fundamental rights would also be adopted if these two norms should interact. However, as chapter one noted, there is no reference to fundamental rights in any of the derogating provisions. Since previous attempts at *political* unity foresaw the incorporation of the ECHR into their proposed legal frameworks, it is submitted here that the drafters of the Rome Treaty did not envisage the need for fundamental rights provision in a polity focused on *economic* integration.[14] This might be particularly true in light of the fact that, at the time of the drafting of the Rome Treaty, fundamental rights protection in Western Europe centred on the civil and political rights contained in the ECHR. If the field of application of free movement were restricted to directly discriminatory conduct, it is difficult to conceive of the adoption of such measures, by Member States, primarily to protect fundamental rights. How would a French decision to distinguish, in its law, between domestic goods and those coming from another Member State better protect the fundamental right to a fair trial or the freedom of association of its citizens? Accordingly, the fact that the derogating provisions do not cater for fundamental rights initially appears unproblematic. Opportunity for interaction between free movement and fundamental rights seems limited. Indeed, consideration of the potentially problematic interaction between primary free movement law and (civil and political) fundamental rights is not really evident in the case-law before the scope of free movement expanded beyond direct discrimination, in cases such as *Cinéthèque, Familiapress,* and *Schmidberger*.[15]

[11] Case 2/74 *Reyners*; Case 44/72 *Marsman*; Case 15/69 *Ugliola,* n.9
[12] E.g. Art.36 TFEU
[13] Case 104/75 *De Peijper* [1976] EU:C:1976:67; Case C-67/97 *Bluhme* [1998] EU:C:1998:584
[14] See E. Furdson, 'The European Defence Community: A History', (Macmillan, 1980); J. Pinder, 'The Building of European Union', (OUP, 1998)
[15] Joined Case 60 and 61/84 *Cinéthèque v Fédération nationale des cinémas français* [1985] EU:C:1985:329; Case C-368/95 *Familiapress* [1997] EU:C:1997:325; Case C-112/00 *Schmidberger* [2003] EU:C:2003:333

Of course, a retrospective examination of the case-law does reveal some instances of clash between the prohibition of direct discrimination and fundamental rights. This is largely the result of an evolution within fundamental rights. At the national, regional, and international levels, second generation economic and social rights, as well as third generation solidarity rights are increasingly presented alongside civil and political rights. For instance, in relation to economic and social rights, Article 59 of the Polish Constitution[16] and Article 28 CFR both recognise the right to collective bargaining and collective action. Regarding third generation rights, s.20 of the Finnish Constitution and Article 37 CFR both require a high level of environmental protection.[17] Second and third generation rights are usually more programmatic in nature. When designing such programmes, the Member States might, in certain cases, find it necessary to adopt distinctly applicable measures. This can become problematic since directly discriminatory rules can only be justified by reference to the exhaustive lists contained in the Treaty's derogating provisions. Consequently, we have seen the Court either perform legal gymnastics in order to allow a Member State to pursue a programmatic fundamental rights goal, or opt to prevent Member States from pursuing fundamental rights protection in a way that directly discriminates against foreign trade.

Walloon Waste illustrates such legal acrobatics.[18] For reasons of environmental protection, a Belgian regional decree prohibited the importation of waste into the area. This has been largely viewed as a directly discriminatory measure since by its nature it did not apply to locally produced waste. Although not explicitly presented as such in the decision itself, *Walloon Waste* accordingly represents a case of conflict between the free movement of goods and Wallonia's programmatic protection of environmental rights.[19] However, environmental protection does not feature in Article 36 TFEU. The CJEU sidestepped this issue by holding that the decree was not, in fact, discriminatory. Since waste was inherently damaging to the

[16] Constitution of the Republic of Poland of 2 April 1997
[17] Constitution of Finland of 11 June 1999; pursuant to Art.52(5) CFR, the 'right' to a high level of environmental protection could constitute a mere 'principle'. As ch.1 argued, this distinction is unimportant for our purposes. While individuals might not be able to invoke directly their 'right to a good environment' before the Court, the CJEU, as an institution of the Union should nevertheless be required to take environmental protection into account in its interpretations of free movement. Indeed, the Court did this in relation to the right to health in Case C-544/10 *Deutsches Weintor* [2012] EU:C:2012:526
[18] Case C-2/90 *Commission v Belgium* [1992] EU:C:1992:310
[19] Art.37 CFR

environment and must, consequently be dealt with at source, waste coming from different regions could not be viewed as comparable.[20]

Laval provides an example of the Court simply refusing to allow Member States to adopt directly discriminatory provisions to attain fundamental rights goals. It will be recalled that in that case a Swedish law permitted national trade unions to view service providers coming from other Member States, where they had signed collective agreements, as if they were not party to collective agreements at all. The Court held that this was an unjustified, directly discriminatory measure. Sweden had argued that the law existed to ensure that all employers active on its labour market pay wages and apply other terms and conditions of employment in line with those usual in Sweden. This can be viewed as a component of the fundamental rights of workers outlined in Articles 27-32 CFR, particularly Article 31 concerning fair and just working conditions. However, although the Court had recognised the right to strike as fundamental as well as the overriding public interest in worker protection, earlier in the same judgment, it simply stated that Sweden's reasons did not fall within the categories of public policy, public security, or public health, contained in Article 52(1) TFEU and so could not be justified.[21]

Thus, although interactions between free movement and fundamental rights were limited where the field of application of the former is restricted to directly discriminatory measures, some instances of clash are still apparent. Nevertheless, as subsequent subsections will demonstrate, the opportunity for conflict between free movement and fundamental rights has increased significantly in light of the expansion of the notion of a breach of free movement beyond distinctly applicable measures. Crucially, the early view of distinctly applicable measures as manifestations of protectionism, or at the very least potentially arbitrarily discriminatory means of pursuing public policy endeavours, encouraged the use of a two-stage breach/justification model, whereby derogations from free movement are interpreted strictly. This becomes problematic where restrictions on free movement are caused by the protection or exercise of fundamental rights. This has become a much more substantial concern as the material scope of free movement has expanded.

[20] Paras.34-36. For criticism, see Bernard, n.4, 94. For suggested alternatives, see the Opinion of AG Jacobs in Case C-379/98 *PreussenElektra AG v Schleswag AG* [2001] EU:C:2000:585, paras.225-238; Opinion of AG Geelhoed, Case C-320/03 *Commission v Austria* [2005] EU:C:2005:459; for comment, see P. Oliver, S. Enchelmaier, 'Free Movement of Goods: Recent Developments in the Case Law', (2007) 44 CMLRev 649, 691

[21] Case C-341/05 *Laval* [2007] EU:C:2007:809, paras.116-119. To some extent, Member States must take responsibility for failing to highlight the fundamental rights relevance of its proposed justification

2.1.2. Indistinctly applicable measures as a restriction on the free movement provisions: increasing the chances of conflict with fundamental rights

Although direct discrimination presents the most obvious obstacle to trade, the Court soon extended the material scope of the primary free movement provisions to cover other barriers to the formation of an internal market, namely indistinctly applicable measures.[22] As the introduction outlined, there are two loose categories of indistinctly applicable measure, though certain national rules might legitimately fall into both.[23] First, indistinctly applicable measures concern rules that appear on their face to apply equally to both domestic and non-domestic Member State trade but are, in fact, more easily satisfied by the former. Thus, in *Angonese*, the Court noted that it was inherently easier for Italian nationals to meet a requirement, imposed by an Italian bank, that employees have certificates of bilingualism issued by the Italian region of Bolzano.[24] Second, indistinctly applicable measures include dual regulatory burdens. The CJEU famously held in its seminal *Cassis de Dijon* judgment that the application, to French producers, of a German rule, requiring fruit liqueurs within its territory to have a minimum alcohol content of 25%, triggered Article 34 TFEU.[25] Although the measure also applied to domestic producers, French products faced a dual regulatory burden since they had already also complied with the regulatory framework in the Member State of production.

Indistinctly applicable measures, of both types, do not generally operate primarily to protect domestic trade. They exist in pursuit of other demands placed on the state. This creates new

[22] The Treaty drafters and the Union legislature had already recognised that measures not constituting direct discrimination could inhibit the internal market and had made provision accordingly via Article 114 TFEU and Commission Directive 70/50/EEC of 22 December 1969 on the abolition of measures which have an effect equivalent to quantitative restrictions on imports and are not covered by other provisions adopted in pursuance of the EEC Treaty (OJ 1970 L13/29). Terming the phenomenon 'normative supranationalism', J. Weiler sites the activism of the Court, in this regard, within the historical context of a deterioration in political supranational decision-making, 'The Community System: The Dual Character of Supranationalism' (1981) YBEL 267

[23] See E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non)-Economic European Constitution', (2004) 41 CMLRev 743

[24] Case C-281/98 *Angonese v Cassa di Riparmio di Bolzano SpA* [2000] EU:C:2000:296; see also Case C-237/94 *O'Flynn v Adjudication Officer* [1996] EU:C:1996:206

[25] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42; on services, Case C-76/90 *Säger v Dennemeyer* [1991] EU:C:1991:331. DRBs are usually more relevant to goods and services since producers and service providers, still established in their Member State of origin, must meet regulatory requirements in that territory as well as in the receiving Member State, whereas workers and businesses seeking to establish themselves in a host Member State (generally) only face a single burden.

opportunities for free movement provisions to interact with fundamental rights. For instance, a Member State rule requiring that foreign Member State nationals, wishing to establish themselves as professionals on its territory, hold local qualifications or seek prior authorisation in relation to their foreign diplomas, would restrict Article 49 TFEU as an indirectly discriminatory measure.[26] However, this might reflect a desire to protect consumers by ensuring that professionals hold qualifications that the State knows to be rigorous.[27] Thus, we see a conflict between the more broadly defined free movement provisions and the right to consumer protection, now contained in Article 38 CFR.[28] In relation to DRBs, in *Cassis* itself, the German government argued that its rules on the alcohol content of liqueur were essential *inter alia* for reasons of consumer protection.[29]

Cassis also increased the likelihood that restrictions of the primary free movement provisions would be triggered by civil and political rights. Thus, in *Familiapress,* an Austrian ban on magazines containing prize draws constituted a *prima facie* breach of Article 34 TFEU since they imposed upon magazines coming from other Member States, product requirements in addition to those publishers already faced in their Member State of production. And yet, the purpose of the prohibition was to protect the freedom of expression by preventing small publishers from being driven from the market by larger undertakings who were financially able to offer such incentives.[30] In *Dynamic Medien,* a rule that sought to protect the rights of the child[31] by requiring digital media to be assessed and labelled for age-certification purposes by the relevant German authorities, constituted a dual regulatory burden since similar procedures had been conducted in the Member State of production.[32] Although the focus here has been on goods, these effects are also viewable across the free movement provisions.[33] DRBs also activate clashes between different Member States' definitions of fundamental

[26] Case C-281/98 *Angonese*, n.24; Case C-19/92 *Kraus* [1993] EU:C:1993:125 where the Court used the language of both indirect discrimination and market access; Case 110-111/78 *van Wesemael (licence for entertainers)* [1979] EU:C:1979:8 in which the CJEU adopted a dual regulatory burden analysis
[27] Case C-340/89 *Vlassopoulou* [1991] EU:C:1991:193; for a case demonstrating the use of a *prima facie* prohibition on indistinctly applicable measures to *facilitate* the social rights of workers, see Case 152/73 *Sotgiu* [1974] EU:C:1974:13
[28] On the irrelevance of the potential status of consumer protection as a mere 'principle', see ns.17-18 by analogy
[29] See also Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] EU:C:1994:34*;* Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] EU:C:1995:224
[30] Case C-368/95 *Familiapress,* n.15
[31] Pursuant to Art.17 UNCRC
[32] C-244/06 *Dynamic Medien*, n.3. In the context of services, see Joined cases C-369/96 and C-376/96 *Arblade* [1999] EU:C:1999:575
[33] On services, Joined cases C-369/96 and C-376/96 *Arblade* ibid; Case C-36/02 *Omega* [2004] EU:C:2004:614

rights. It will be recalled from chapter one that *Familiapress,* for instance, can be viewed as a conflict between two Member State methods of protecting the fundamental right to freedom of expression. This is generated by the flow of goods between Member States and, in particular, the need to facilitate this movement by minimising regulatory duplication.[34]

In the free movement of goods context, the Court recognised that, post-*Cassis*, individuals were increasingly using Article 34 TFEU not to eliminate the additional burdens they faced as foreign Member State traders, but instead to challenge regulation that restricted their activities in the host State in a more general sense. The classic example of this is the *Sunday Trading* case-law whereby non-national traders argued that host State rules precluding trading on Sundays imposed an obstacle to the intra-EU movement of goods.[35] In *Keck,* the Court held that 'the increasing tendency of traders to invoke [Article 34 TFEU] as a means of challenging any rules [that] limit their commercial freedom even where such rules are not aimed at products from other Member States' required it to reconsider its case-law.[36] In doing so, the Court differentiated between product requirements – such as rules on designation, composition, form, size, weight, presentation, labelling, and packaging – and selling arrangements. While the former restricted Article 34 *per se,* the latter did not, provided that they affected in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.[37]

For our purposes, it might appear that, since *Keck* limited the opportunity for free movement to encroach on Member State regulation, the potential for free movement to interact with fundamental rights would also be reduced. In fact, it is submitted that *Keck* did relatively little to decrease potential conflict between these norms.[38] First, our discussion of cases such as *Dynamic Medien* has already demonstrated that while product requirements might constitute very real barriers to trade, they can also operate primarily to protect fundamental rights, rather than to undermine the internal market. Second, the Court's approach to assessing whether

[34] See also Case C-36/02 *Omega,* ibid
[35] Case 145/88 *Torfaen BC v B&Q plc* [1989] EU:C:1989:593
[36] Joined Cases C-267 and 268/91 *Keck and Mithouard* [1993] EU:C:1993:905, para.14
[37] Paras.16-17
[38] C.f. Case 382/87 *Buet v Ministère Public* [1989] EU:C:1989:198. Here, a ban on doorstep selling, to protect vulnerable consumers, constituted an MEQR. Post-*Keck,* as a selling arrangement, it might no longer fall within the material scope of Art.34 TFEU. See M. Dougan, 'Minimum Harmonisation and the Internal Market', (2000) 37 CMLRev 853, 870. The issue of whether such a rule applied equally, in law and in fact, to foreign traders was left to national court in Case C-441/04 *A-Punkt* [2006] EU:C:2006:141, though the CJEU guidance suggests a difference in impact.

selling arrangements 'affect in the same manner, in law and fact' the marketing of domestic and foreign goods has, in fact, created new potential for interaction between free movement and fundamental rights.

In *LIBRO*,[39] an Austrian selling arrangement, which provided that importers and retailers of books could not fix prices below the recommended retail price (RRP) set in the Member State of publication, was found not to affect domestic and other European suppliers in the same way.[40] Whereas Austrian publishers could set the RRP of books to suit the Austrian market, importers could not, since they were required to use an RRP set according to the conditions of a different market.[41] The reason for the Austrian rule was grounded in a desire to ensure media diversity such that economically less attractive works could still be financed and smaller booksellers could offer a wider range of works. Thus, although not explicitly stated by the Austrian Government, the rules found to be imposing restrictions on the free movement of goods in *LIBRO* were rooted in protecting the fundamental right to freedom of expression.

In addition, the Court has also frequently accepted arguments from importers/foreign traders that national rules on advertising affect them more than domestic producers. This has also created new interfaces between free movement and fundamental rights. For instance, in *De Agostini*,[42] Sweden had banned, *inter alia*, television advertising directed at children under 12 years of age. Although the rule applied to both domestic and foreign traders and did not impose additional requirements on products coming from other Member States, it was found to constitute a restriction on Article 34 TFEU since it had a greater impact on non-national producers. Specifically, television advertising might be the only effective method for non-domestic traders to penetrate the Swedish market.[43] This might well be true, especially where a trader wishes to use the same marketing methods across several Member States. However, crucially, the purpose of the Swedish measures was not to shield domestic production but to protect the consumer and, in particular, to safeguard the rights of the child.[44] Thus, we see

[39] Case C-531/07 *Fachverband der Buch-und Medienwirtschaft* [2009] EU:C:2009:276
[40] It should be noted that a distinct rule - para.3(2) and (3) BPrBG - dealt with imported goods, whereas para.3(1) concerned domestic books.
[41] Para.19-21
[42] Joined Cases C-34-36/95 *Konsumentombudsmannen v De Agostini and TV-Shop* [1997] EU:C:1997:344
[43] Paras.42-43
[44] Paras.53 and 61, although the discussion was focused on Directive 89/552/EEC on television broadcasting **(**OJ 1989 L298/ 23)

examples of conflict between free movement and fundamental rights as the material scope of free movement has expanded to cover indistinctly applicable measures.[45]

2.1.3. The impact of a market access test on the frequency of interactions with fundamental rights

The requirements of the market access test are outlined comprehensively in the seminal *Gebhard* case, concerning the freedom of establishment.[46] In that judgment the Court held that the Italian rule, whereby individuals wanting to use the professional title *avvocato* had to be registered to the local Bar, was a restriction of Article 49 TFEU, since it was 'liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the Treaty'.[47] The rule applied to all individuals and compliance with it was not inherently easier for Italians. Moreover, since Mr. Gebhard was establishing himself in Italy, the measure was not a burden in addition to those imposed by his home State. Accordingly, *Gebhard* represents an expansion in the material scope of Article 49, creating a portal through which a wider range of Member State law and policy, beyond those imposing dual burdens, can be assessed at EU-level. Crucially, the *Gebhard* test now reflects the standard formula for defining a breach of the majority of the fundamental freedoms.[48] Debate remains as to its application to the free movement of goods. While the *Keck* ruling, outlined above, might suggest that a single burden, market access test is not appropriate in that context, the judgment actually contained a reference to impediments to market access.[49] Further, the Court has utilised the market access test in subsequent goods case-law on product-use. Thus, in *Commission v Italy (trailers)*, prohibiting mopeds from towing trailers, even those designed for use with such vehicles, was declared a restriction on Article 34 TFEU.[50] Although

[45] See also Case C-405/98 *Gourmet* [2001] EU:C:2001:135, concerning a clash, *inter alia*, between the free movement of goods and Swedish measures restricting the advertising of alcohol in an effort to promote public health. Although this can be viewed as falling within the public interest of 'public health' under Arts.36 and 52(1) TFEU, this can also be presented as a *right* to health in light of Art.35 CFR, particularly following the approach of the CJEU in Case C-544/10 *Deutsches Weintor*, n.17

[46] Case C-55/94 *Gebhard* [1995] EU:C:1995:411

[47] Para.39

[48] In Joined Cases C-197/11 and C-203/11 *Libert* [2013] EU:C:2013:288 , the CJEU uses the *Gebhard* test to ascertain *prima facie* breaches of Arts.21, 45, 49, 56, and 63 TFEU. Specifically, see Case C-384/93 *Alpine Investments v Minister van Financiën* [1995] EU:C:1995:126, Case C-405/98 *Gourmet*, n.45 (services); Case C-415/93 *Bosman* [1995] EU:C:1995:463 (workers); Case C-171/08 *Commission v Portugal* [2010] EU:C:2010:412 (capital)

[49] Joined Cases C-267 and 268/91 *Keck* , n.36, para.17

[50] Case C-110/05 *Commission v Italy* [2009] EU:C:2009:66

importation of trailers was not precluded, the ban on their use would inevitably reduce consumer interest, thereby affecting 'the access of that product to the market of that Member State'.[51] This approach was echoed soon after in *Mickelsson and Roos*, concerning a prohibition on the use of personal watercraft outside designated waterways.[52] These judgments have invited questions from commentators as to whether market access now provides the umbrella test in goods cases, or whether it operates as a mere residual category of restriction.[53]

The incorporation of single burdens within the material scope of free movement creates new interfaces between free movement and national law and policy, which pursues diverse policy goals rather than protectionist agendas. This inevitably increases the potential for interaction between free movement and fundamental rights. The most infamous examples of this are, of course, the *Viking* and *Laval* judgments.[54] A comprehensive outline of the facts of those seminal decisions was provided in chapter one and will not be repeated here. In short, *Laval* concerned strike action by a Swedish trade union to force a Latvian undertaking to grant its employees, whom it had posted to Sweden, the terms and conditions contained in a Swedish collective agreement. Previous cases concerning the posting of workers, while using the language of market access, had generally adopted a dual regulatory approach. Thus, in *Arblade*, a host State was not permitted to require foreign service providers to pay into its national bad-weather and loyalty stamp scheme for its employees where that undertaking already contributed to such a scheme in its Member State of origin.[55] In *Laval,* the Court went further, holding that collective action relating to terms and conditions going above and beyond those referred to in Article 3(1)(a)-(g) PWD constituted a breach of the free provision of services 'since it was liable to make it less attractive or more difficult for undertakings to provide construction services in Sweden'.[56] The question of whether the fundamental social rights of workers were already protected in the undertaking's home State was now less relevant at the justification stage since the focus was on the core nucleus of the PWD, rather than the existence of equivalent protection in the home State. Hence, the market access test makes a direct contribution to increased conflict between free movement and fundamental rights; in this case between the free provision of services and the fundamental right to strike,

[51] Para.56
[52] Case C-142/05 *Åklagaren v Mickelsson and Roos* [2009] EU:C:2009:336
[53] Weatherill, n.6; Snell, n.7
[54] Case C-438/05 *Viking* [2007] EU:C:2007:772; Case C-341/05 *Laval*, n.21
[55] Case C-369/96 *Arblade*, n.32
[56] Case C-341/05 *Laval*, n.21, para.99

recognised by Article 28 CFR.[57] In fact, the Court went as far as to hint that the very threat of collective action might be enough to trigger Article 56 TFEU where 'in order to ascertain minimum wage rates for posted workers, undertakings may be forced into negotiations of unspecified duration'.[58]

In *Viking*, collective action, threatened by the Finnish Seamen's Union to persuade the owners of a ship to continue to apply Finnish law and collective agreements to its workers should the ship be re-flagged to Estonia, constituted a *prima facie* breach of Article 49 TFEU. The result sought by the union would 'make it less attractive or even pointless' for Viking to exercise its freedom of establishment, since the purpose of the move was to sign Estonian collective agreements and thus lower costs.[59] In addition, a circular, issued by the International Transport Workers' Federation, calling for affiliated unions to refuse to negotiate with Viking, pursuant to its 'Flags of Convenience' policy (FoC), was considered 'liable to restrict' the freedom of establishment. The FoC stipulated that ships should be flagged to their country of beneficial ownership and its purpose was to avoid precisely the situation in *Viking*, whereby employers are able to adopt lower terms and conditions of worker protection by establishing themselves, nominally, in another country. This is an example of a wider phenomenon whereby the freedom of establishment is utilised to avoid restrictive Member State regulation. For example, in *Centros*, a company was incorporated in the UK, since that Member State imposes no minimum share capital requirements in respect of limited liability companies, but intended to operate primarily through a branch in Denmark, which does impose such obligations.[60] The refusal of the Danish authorities to register the branch, because it believed the company to be using its Article 49 rights to circumvent Danish rules, was held, by the CJEU, to be a breach of the freedom of establishment, since it restricted access to the Danish market.[61]

Crucially, this creates the potential for Member State efforts to protect intrinsically weaker groups to constitute a breach of Article 49. For instance, the German rule of co-determination requires companies of a certain size, including those administered but not incorporated in Germany, to include worker representatives on their boards. As Johnston highlights, *Centros*

[57] For an example of congruence between a restrictions test and fundamental rights, see Case C-60/00 *Carpenter* [2002] EU:C:2002:434
[58] Para.100
[59] Case C-438/05 *Viking*, n.54, para.72
[60] Case C-212/97 *Centros* [1999] EU:C:1999:126
[61] Para.27

poses a danger to this model, since it allows companies to avoid this obligation, by establishing in a Member State where co-determination is not required, whilst still principally operating out of a branch in Germany.[62] This would diminish standards of worker consultation, explicitly recognised as a fundamental right by Article 27 CFR, and, as Johnston argues, would 'privilege return to super-mobile financial capital at the expense of far less mobile human capital'.[63]

The potential for market access to provoke interactions between the free movement of capital and Member State efforts to protect fundamental rights can be viewed in the very case in which the test was introduced to that freedom, namely the *Golden Shares* judgment.[64] Following the privatisation of previously nationalised industries, 'golden-shares' deviated from the basic company law principle of 'one share, one vote', providing the State with control over certain decisions of the company, which was disproportionate to the size of its shareholding. The purpose of the 'golden share' is not to discriminate against foreign investors but to retain State input in undertakings, such as utility companies, that offer key public services,[65] an endeavour recognised as fundamental by Article 36 CFR. Nevertheless, the Court has found that 'golden shares' constitute a restriction of Article 63(1) TFEU since they affect the position of other shareholders and are therefore liable to deter investors in other Member States from making investments, restricting access to the market.[66]

Cutting across the expansion of the material scope of free movement, from distinctly applicable measures to rules restricting market access, is the finding that the Treaty not only imposes *prima facie* prohibitions on Member State activity that restricts free movement, but that it also requires Member States to take positive steps to protect the market freedoms. This definitional progression also leads to further instances of conflict between free movement and fundamental rights.

[62] A. Johnston, 'EC Freedom of Establishment, Employee Participation in Corporate Governance and the Limits of Regulatory Competition', (2006) 6 JCLS 71
[63] Ibid, 80
[64] Case C-171/08 *Commission v Portugal,* n.48
[65] E.g. Case C-463/04 *Federconsumatori and others* [2007] EU:C:2007:752, concerning gas and electricity.
[66] Case C-171/08, *Commission v Portugal*, n.48, para.67. In the context of the fundamental social rights of workers, see Case C-112/05 *Commission v. Germany (Volkswagen)* [2007] EU:C:2007:623. On the interaction of the free movement of capital with fundamental rights beyond the 'golden-shares' case-law, in the context of a market access test, see Joined Cases C-197/11 and C-203/11 *Libert,* n.48, para.66

2.1.4. Introducing a positive obligation to protect free movement

In *Spanish Strawberries*,[67] the Court held that France was in breach of Article 34 TFEU, on the free movement of goods, due to the passivity of its authorities, in tackling the violent protests of French farmers against imported produce. Article 34 not only imposed a negative obligation that Member States abstain from activity that restricted the free movement of goods, it also applied where Member States failed to take positive steps to prevent obstructions to intra-State trade, emanating not from the State itself but from private individuals.[68]

Although arguably an understandable outcome on the facts, since the case included violent and directly discriminatory attacks on goods in transit, *Spanish Strawberries* introduced a new potential avenue for clash between free movement and fundamental rights. First, the case itself can be viewed as such an occurrence, namely between the free movement of goods and the farmers' freedom of association and freedom of expression. However, it is unlikely that criminal law precluding the acts that occurred in *Spanish Strawberries* – such as the destruction of stock and threats to shopkeepers - would be a violation of Articles 10 and 11 ECHR. Both provisions may be restricted by laws necessary within a democratic society for the prevention of crime.[69]

Second, the Court's reasoning left open the possibility that the Member State would be required to take positive steps to prevent action by private individuals that restricted free movement even where it was not violent or directly discriminatory, and involved clear exercise of fundamental rights. This was confirmed in *Schmidberger*.[70] It will be recalled from chapter one, that in that case the Court held that the decision of the Austrian authorities not to prevent a peaceful, environmental protest, which blocked a key transport hub between Member States for 30 hours, constituted a *prima facie* breach of Article 34. Confirming *Spanish Strawberries*, the Court declared that the Member States were required to take all necessary and appropriate measures to ensure that the free movement of goods was respected on their territories. In other words, a restriction on Article 34 was established because Austria had not taken positive steps to restrict the fundamental rights to freedom of expression and

[67] C-265/95 *Commission v France (Spanish Strawberries)* [1997] EU:C:1997:595
[68] Paras.30-31.
[69] Arts.10(2) and 11(2) ECHR
[70] Case C-112/00 *Schmidberger* [2003] EU:C:2003:333

association, protected by Articles 10 and 11 ECHR, of the demonstrators. The CJEU acknowledged Austria's Convention obligations, but utilised the availability of derogations from Articles 10 and 11 ECHR to stipulate that Member States that did not utilise those derogations, for the purposes of respecting the free movement of goods, would be in *prima facie* breach of Article 34 TFEU. Further, it inverted the structure of the Article 10(2) and 11(2) derogations, exposing the protection of fundamental rights to a proportionality assessment in light of the restrictions they placed on free movement.[71]

The reliance on *Spanish Strawberries*, in *Schmidberger*, seems to have masked an additional development: the progression towards a 'restrictions' based test. Unlike in *Spanish Strawberries*, the protest in *Schmidberger* was not directly discriminatory. It might be viewed as indirectly discriminatory: as a hub for intra-Union trade, the location of the protest could have impacted more heavily on foreign goods.[72] However, the language of the Court centres on restrictions[73] and therefore appears focused on the general reduction in the volume of intra-Union trade. Thus, despite *Keck*, *Schmidberger* hints at the further use of a market access test, in relation to positive obligations, and accordingly demonstrates, in a number of ways, the increased volume of free movement/fundamental rights interactions that results from the evolving definition of a breach of free movement.

In sum, the expansion in the material scope of the free movement provisions has made a significant and direct contribution to the frequency with which free movement confronts Member State attempts to protect fundamental rights. Although a number of cases demonstrate that even directly discriminatory measures can seek to protect fundamental rights, it is the evolution of the definition of a breach of free movement, from distinctly applicable measures through to market access, which has vastly increased interaction between free movement and fundamental rights. Similarly, the evolution of a breach of free movement to encompass an obligation on Member States to take positive steps to ensure free movement, in response to the actions of private individuals, has led to new conflicts with fundamental rights. Similarly, the broadening of the *personal* scope of free movement has also raised the frequency of clashes between free movement and fundamental rights.

[71] This issue is discussed in the case-study of the right to strike in ch.1, s.4.3.2.2. See also E. Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009), 356-357
[72] See e.g. paras.77-81 and 89
[73] Paras.57-62

2.2. **Watts** *a service? The increasingly broad personal scope of the free movement provisions as a direct contributor to a greater frequency of interactions between free movement and fundamental rights*

In order to trigger the free movement provisions, a litigant must fall within their personal scope. For instance, if an individual wishes to challenge Member State rules as a breach of Article 45 TFEU, on the free movement of workers, she/he must demonstrate that she/he is, in fact, a worker for the purposes of those provisions. Since the free movement provisions seek to facilitate the creation of an internal market by dismantling internal frontiers, applicants must generally also demonstrate a cross-border element to their case.[74] The purpose of this subsection is to assess the effects of the Court's generous approach to defining the personal scope of free movement on the extent of free movement's interactions with fundamental rights. Although reference will be made to a range of freedoms, the freedom to provide services will serve as a case-study to argue that expansion within the personal scope of free movement has created new opportunities for conflict between free movement and fundamental rights. Not only does focus on Article 56 TFEU permit a detailed demonstration of the variety of ways the extension of the personal scope of free movement can trigger new conflicts with fundamental rights, it also avoids overlaps with related issues discussed elsewhere in the thesis. For example, the broadening of the personal scope of Article 45 on workers will be explored in the context of analysing the contribution Union citizenship makes to a procedural preference for free movement in chapter four. Similarly, the requirement, in *Centros*,[75] that a Member State must recognise the legal status of companies established in other Member States that wish to set up branches on their territory even where those undertakings do not meet the host State's incorporation rules was discussed, from a fundamental rights perspective, in s.2.1.3.[76] The subsection will consider, first, the Court's

[74] Although the continued relevance of this rule is debated: A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe' (2008) 35 IEI 43; N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?' (2002) 39 CMLRev 731

[75] Case C-212/97 *Centros*, n.60

[76] An undertaking constitutes a 'company' for the purposes of Art.49 TFEU where it meets the relevant requirements of company law in its Member State of incorporation: Case 81/87 *Daily Mail* [1988] EU:C:1988:456, Case C-210/06 *Cartesio* [2008] EU:C:2008:723. The personal scope of Art.65 TFEU on capital is defined by reference to the now defunct, but still indicative, Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L178/5) (see Case C-222/97 *Trummer and Mayer* [1999] EU:C:1999:143, para.21); the personal scope of Art.34 TFEU is necessarily defined by reference to

broad and value-neutral approach to key definitional terms, which brings sensitive policy choices, aimed at fundamental rights protection, within the personal scope of Article 56 TFEU. Next, the subsection will detail the Court's 'reading in' of new beneficiaries of Article 56 and the subsequent weakening of the cross-border requirement, which can also bring new fundamental rights issues to the fore.

2.2.1. Protecting fundamental rights but breaching Article 56: the consequences of a broad, and neutral, approach to defining key terms

The general definition of a service, for the purposes of Article 56 TFEU, is provided by Article 57 TFEU. That provision defines as a 'service' activity normally provided for remuneration temporarily in the host State…' It will be argued here that the CJEU's generous approach to the terms 'service', 'remuneration' and 'temporarily' can lead to conflict between Article 56 and fundamental rights.

2.2.1.1.'Services': a 'neutral' term

This subsection is concerned with the Court's response to arguments that certain activities should fall outwith the concept of a service by their very nature, or because they represent legitimate Member State policy endeavours, not directly related to the internal market and falling outside the Union's legislative competence. Crucially, these policy areas will, at times, incorporate fundamental rights. The subsection will demonstrate that the Court is generally dismissive of such arguments, opting to define 'services' neutrally.

For instance, in *Grogan*, the Court found the provision of abortion to constitute a service for the purposes of Article 56 TFEU, notwithstanding that the Society for the Protection of the Unborn Child had argued that, as a 'grossly immoral act' abortion should not, by its very nature, be defined as such.[77] Since abortion was a legal medical service in several Member States, the CJEU was not prepared to substitute the decisions of legislatures in those States

imported goods, though see Case C-441/04 *A-Punkt*, n.38 as interpreted by A. Tyfonidou, 'Further Steps on the Road to Convergence', (2010) ELRev 35(1) 36.

[77] Case C-159/90 *Grogan* [1991] EU:C:1991:378

where the practice was legal with its own assessments.[78] The Court had already held that medical activity, if remunerated, fell within the scope of Article 56.[79] This approach is understandable in light of the passionate conflicting views surrounding abortion, not only across and within the Member States, but throughout the world. Nevertheless, the Court's claimed neutrality in defining a 'service' in fact favours the viewpoint of the legislatures and service providers in Member States where abortion is legal.[80] This brought the fundamental right to life, as defined by the Irish Constitution which includes the right to life of the unborn child, a step closer to a clash with the free provision of services.[81]

Furthermore, the confirmation that remunerated medical services fall within the personal scope of Article 56 potentially exposes Member State programmes designed to ensure access to healthcare to review as potential breaches of the free provision of services. And yet, Article 35 CFR explicitly states that 'everyone has the right to benefit from medical treatment under conditions established by national laws and practices'. To explore this issue in more detail, we need to consider the Court's interpretation of the remuneration requirement.

2.2.1.2.'Remuneration': a broad concept

While a literal approach to 'remuneration' might suggest that a service is 'remunerated' where the service recipient pays the service provider, the Court has taken a much broader view of the term. Thus, the Court has held that remuneration does not have to come from the service recipient.[82] In *Deliège*, amateur sportspeople fell within the personal scope of Article 56 due to the indirect remuneration triggered by their activities, including ticketing for venues, revenue for television broadcasters, and publicity for sponsors.[83] These developments raised the question of whether services, remunerated, or even provided directly, by the State, such as education and healthcare, were included in the field of application of Article 56.

[78] Para.19
[79] Para.18, citing Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] EU:C:1984:35, para.16
[80] J. Coppel, A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 CMLRev 669, 686; c.f. J. Weiler, N. Lockhart, ''Taking Rights Seriously' Seriously: The European Court and its Fundamental Rights Jurisprudence – Part II', (1995) 32 CMLRev 579, 598-599, who argue that the Court was aware of the moral dilemma the case presented but was responding to a question directly asked of it by the referring court.
[81] G. de Búrca argues that the approach of AG van Gerven in that case may well reflect a moral choice that a woman's physical integrity and moral autonomy rank equally with the right to life of the unborn child, 'Fundamental Human Rights and the Reach of EC Law', (1993) 13(3) OJLS 283, 300
[82] Case 352/85 *Bond van Adverteerders* [1988] EU:C:1988:196
[83] Cases C-51/96 and C-191/97 *Deliége* [2000] ECR I-2549, para.57

Although the Court has held that publicly-funded education does not constitute a service for the purposes of Article 56,[84] as outlined above, medical treatment does fall within the personal scope of that provision.[85] Crucially, in *Watts,* this had implications for a healthcare system funded from the public purse.[86] The relevant authorities in the UK had refused to reimburse Mrs. Watts, for medical treatment she had paid for in France, on the basis that the UK's National Health Service (NHS), as a free-at-the-point-of-delivery system funded from general taxation, had no mechanism for reimbursement. The CJEU held that since Mrs. Watts had remunerated a service provider for medical treatment received in another Member State, the issue fell within the scope of Article 56 TFEU, without it being necessary to determine whether healthcare provided by the NHS was a service for the purposes of Article 56 TFEU.[87] The decision in *Watts* potentially interferes with 'the right to medical treatment in accordance with national laws and practices', as recognised by Article 35 CFR, since the consequent requirement of a reimbursement mechanism will require changes to the structure, organisation, and budgetary planning of a healthcare system that, being free at the point of service, previously required no such mechanism.[88] Reimbursement would have to be funded by diverting other resources.

Ironically, however, implicit in this judgment is also the utilisation of a Member State's responsibilities to provide access to healthcare for its citizens to create a relationship between Mrs. Watts and the NHS that would otherwise not exist. In the earlier case of *Kohll*, a health insurance provider had been required to reimburse Mr. Kohll for medical treatment that he had paid for in another Member State.[89] Since insurers already provided reimbursement for treatment received in the home State, the decision required them to do little more than they were already doing. Thus, the outcome arguably rested not only on Mr. Kohll's payment for services abroad but also on his service relationship with his insurer. Under the NHS system, there is no such relationship between an individual who seeks treatment elsewhere and a national healthcare provider. In *Watts,* the connection between the medical services that Mrs.

[84] Case 263/86 *Humbel* [1988] EU:C:1988:451; but, privately-funded education can constitute a service: Case C-109/92 *Wirth* [1993] EU:C:1993:916
[85] Joined Case C-286/82 and 26/83 *Luisi and Carbone,* n.79; Case C-158/96 *Kohll* [1998] EU:C:1998:171
[86] Case C-372/04 *Watts* [2006] EU:C:2006:325
[87] Para.91
[88] See, similarly, in relation to a benefits-in-kind insurance scheme, Case C-157/99 *Geraets-Smits and Peerbooms* [2001] EU:C:2001:404
[89] N.85

Watts paid for abroad and the NHS must therefore impliedly rest on the UK's fundamental obligations to provide its citizens with access to healthcare. This conflicts with the UK's choice to meet this obligation through a nationalised structure. Although public treatment is available to them, a proportion of people in the UK opt for private healthcare in that State outwith the NHS, for which no reimbursement is available. In seeking treatment from outside the NHS structure, Mrs. Watts is arguably comparable to these individuals. The Court, in *Watts*, effectively exploited the Member State's fundamental rights duties in relation to the provision of healthcare to force it to reimburse Mrs. Watts for a service that she had chosen to pay for herself, and for which she would not be entitled to claim had she received similar private treatment in the UK. This might have been beneficial to Mrs. Watts, but, given the incongruence of reimbursement in a nationalised healthcare model, and its potential impact on planning and budgets, this arguably poses a threat to a system that seeks to ensure the fundamental right to healthcare for *all*. In short, those who are not financially or linguistically able to exploit their free movement rights to benefit from medical services abroad might suffer because those that can do.[90] Accordingly, the Court's broad approach to 'remuneration' has caused free movement to interact with complex areas of Member State law and policy that can be targeted at the protection of fundamental social rights, such as the programmatic provision of healthcare.[91]

2.2.1.3.'Temporariness': a semi-permanent notion

There are two developments in relation to the 'temporariness' requirement that have had an appreciable impact on the level of contact between free movement and fundamental rights. First, the term is applied generously to service providers who, in fact, maintain a long-term or repeated physical presence in a host State. Second, thanks to technology, providers can now offer services across borders on a permanent basis without ever having to establish themselves in a host State. Since Article 56 TFEU does not allow host Member States to impose as many of their regulations on service providers as would be the case in relation to workers and establishment, this limits Member State space for the implementation of policies related to fundamental rights protection.

[90] See C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 CMLRev 1643, 1660-1661
[91] Art.34 CFR

Traditionally, if a person or undertaking maintained a permanent economic base, such as an office, in a host Member State, they would fall within the scope of Article 49 TFEU on freedom of establishment.[92] Although arguably weakened by the introduction of a market access test,[93] this freedom generally allows the host Member State to impose more of its rules on that individual/company since, being settled there, they are exposed to a single regulatory regime.

However, in *Gebhard*, the Court held that a service did not necessarily cease to be temporary simply because a service provider might need to establish some kind of infrastructure, such as an office, in the host State.[94] This is also relevant to construction companies, who will establish worksites in a host State, having been awarded a service contract there.[95] As *Laval* demonstrates, host Member States, and the trade unions within them, are restricted in terms of the protection they can offer workers posted to their territory under service contracts. This is logical in the short-term since a change in the terms and conditions of employment for temporary work performed in another State potentially imposes a sizeable burden on employers. Arguably the quality of posted workers' lives is unlikely to be significantly affected if they do not receive the same terms and conditions as comparable host State employees.[96] However, the CJEU has declared that services, such as the construction of a large building, which might be provided over several years, can fall within the personal scope of Article 56.[97] Posted workers operating under long-term or renewable service contracts are more comparable to workers moving across intra-State borders pursuant to Article 45 TFEU, since they are likely to encounter the (usually) higher costs of the host Member State and be away from their families over long periods. This creates an interface between the free provision of services and the fundamental social rights of workers and individuals' fundamental right to family life.[98] And yet, while individuals falling within the personal scope of Article 45 would enjoy the same terms, conditions and social advantages as national employees, and would be entitled to bring family members with them to the host State,[99] this

[92] Case 205/84 *Commission v Germany* [1986] EU:C:1986:463, para.21
[93] See discussion of Case C-212/97 *Centros* (n.60) in s.2.1.3. above
[94] Case C-55/94 *Gebhard,* n.46, para.27
[95] Case C-458/08 *Commission v Portugal* [2010] EU:C:2010:692
[96] See frontier Case C-165/98 *Mazzoleni* [2001] EU:C:2001:162
[97] Case C-458/08 *Commission v Portugal,* n.95, para.85; Case C-215/01 *Schnitzer* [2003] EU:C:2003:662
[98] See Arts.31 and 7 CFR, respectively
[99] Pursuant to Art.6, Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L158/77)

is not the case for workers posted pursuant to Article 56. Moreover, given the likely high cost of living in the host State, and the inability, post-*Laval,* of host States or trade unions to impose 'going rate' as opposed to minimum rates of pay,[100] posted workers' ability to return home to maintain family relationships could be restricted.[101]

The temporary nature of services has also been affected by certain technologies. Some services, by their nature, do not require a host State base. For instance, the permanent provision of televisual services in one Member State, by a broadcaster transmitting from, and established in, another Member State, has been held to fall within the scope of Article 56 TFEU.[102] This has allowed broadcasters to argue that attempts by Member States to impose rules upon them, which would ordinarily be enforced against stations established on their territory in order to protect the freedom of expression or the rights of the child, are restrictions on the free provision of services.[103] Similarly, certain technological advancements have removed the need for undertakings to be established in host States. This has created the opportunity for undertakings to circumvent Member States rules targeted at protection of fundamental rights. In *Gambelli,*[104] an Italian measure prohibited the taking or forwarding of bets, without a licence from the Italian authorities. Gambelli nevertheless used the internet to act as an intermediary between Italian gamblers and bookmakers legally registered in the UK. When faced with criminal proceedings, Gambelli successfully argued that the Italian rule restricted a service within the meaning of Article 56, though the CJEU accepted that the Italian rule existed for reasons of consumer protection.[105]

Thus, the Court's broad approach to key terms that define the personal scope of Article 56 TFEU have significantly increased the volume of interactions between that freedom and fundamental rights. Similarly, the Court's introduction of the 'service recipient', which allows Article 56 to be engaged where an individual travels to a service provider's State of establishment, has also contributed to a rise in free movement/fundamental rights interfaces.

[100] A factual discussion of this outcome in the *Laval* case-law is provided in ch.1, s.2.2
[101] For full discussion of this issue, see S. Currie, 'Men on the Sidelines: The Reconciliation of Work and Family Life Agenda in the Context of Cross-Border Posting, (2013) J. Soc. Wel. & Fam. L. 389
[102] Case 155/73 *Sacchi* [1974] EU:C:1974:40, para.6
[103] Case C-23/93 *TV10* [1994] EU:C:1994:362, although it should be noted that since this case preceded the *Centros* judgment (n.60), the Court held that the service provider did not fall within the scope of Art.56 since it was only established in another Member State to circumvent rules in their State where it carried out its principal activities; see also Joined Cases C-34-36/95 *De Agostini,* n.42
[104] Case C-243/01 *Gambelli a.o.* [2003] EU:C:2003:597
[105] Art.38 CFR; consider also Case C-322/01 *Deutscher Apothekerverband* [2003] EU:C:2003:664

In several cases, it has also been unnecessary to identify particular service recipients residing in Member States other than the State of establishment of the service provider. This weakening of the cross-border requirement also widens the scope for conflict between free movement and fundamental rights. It is to these phenomena that we now turn.

2.2.2. *Introducing new beneficiaries and weakening the cross-border requirement: increasing opportunity for fundamental rights conflicts*

Although Article 56 only explicitly prohibits restrictions on the freedom to *provide* services, the Court held in *Luisi and Carbone* that *recipients* of services also fell within its scope.[106] In *Watts*, this allowed an individual, who had travelled to another Member State to receive medical services, to argue that a refusal by her home State healthcare provider to reimburse her for this treatment, constituted a breach of Article 56 TFEU. As discussed above, this creates a new interface between free movement and Member State provision of the right to access to healthcare.

The recognition of the service recipient also permits undertakings to challenge rules imposed in their Member State of establishment as restrictions on access to their services by recipients located in other Member States. Thus, in *Gourmet*,[107] a Swedish ban on the advertising of alcohol was found to constitute a restriction on the right of Swedish press undertakings to offer their advertising services to product-sellers from other Member States. The purpose of the Swedish prohibition was to protect public health, which can be viewed as an essential component of the right to health, recognised by Article 35 CFR.[108] In an example of congruence between free movement and fundamental rights, a service provider in *Carpenter*[109] was able to challenge a UK immigration decision, with an impact on his fundamental right to family life, as a breach of Article 56 on the basis that he provided advertising space to recipients in other Member States. Moreover, that provision was triggered whether or not Carpenter had to go physically to another Member State to provide that service. It was unnecessary in both *Gourmet* and *Carpenter* actually to identify a particular service recipient. In fact, across all of the freedoms, it is not required that national

[106] Joined Case C-286/82 and 26/83 *Luisi and Carbone*, n.79
[107] Case C-372/04 *Watts* , n.86
[108] See Case C-544/10 *Deutsches Weintor*, n.17
[109] Case C-60/00 *Carpenter*, n.57

rules have an impact on cross-border trade *on the facts*, to bring a matter within the scope of EU law. It is sufficient that there is the possibility for those same rules to affect trade coming from other Member States. In *Libert*, this allowed Belgian property developers to challenge a Belgian rule, targeted at securing the fundamental right to access to housing, as a restriction of Article 63 TFEU.[110]

As Spaventa points out, when discussing *Gourmet*, the combination of a market access test with a general relaxation of the cross-border requirement allows economic actors to challenge the *very existence* of market regulations on the domestic market.[111] This greatly increases the potential for interaction between free movement and fundamental rights because, as she notes elsewhere, if free movement is triggered by rules that make activity less attractive to economic actors, 'it becomes difficult to identify which, if any, national rules fall outside the scope of the Treaty and therefore need not be justified.'[112] Speaking about market access generally, Advocate General Tizzano has expressed concern that, rather than forming a space in which operators can move freely, a test based on reduction in the economic attractiveness, would instead be used to create a 'market without rules'.[113] Since fundamental rights manifest as rules in domestic legal orders, this expansion applies equally to them.

Section two demonstrated that the evolution of a breach of free movement, from distinctly applicable measures to rules restricting market access, and the requirement that Member States take positive steps to secure freedom of movement, has directly contributed to more frequent conflict between free movement and fundamental rights. The Court's generous approach both to the interpretation of key definitional terms, relating to the personal scope of free movement, and to the cross-border requirement, have had similar effects. Placed in their internal market context, these developments are understandable, since they reflect the Court's appreciation of the varied ways that economic integration can be impeded. However, the internal market logic behind these expansions does not alter the fact that they expose Member State fundamental rights choices to scrutiny as breaches of the free movement provisions. Unlike protectionist activity, such law and policy does not strike deliberately at the heart of common market ideals, having only oblique, though admittedly at times significant, effects on

[110] Joined Case C-197/11 and 203/11 *Libert*, n.48. See, in relation to goods, Case C-321/94 *Pistre a.o.* [1997] EU:C:1997:229
[111] Spaventa, n.23, 754-755
[112] E. Spaventa**, '**Leaving *Keck* Behind? The Free Movement of Goods After the Rulings in *Commission v Italy* and *Mickelsson and Roos*', (2009) 34(6) ELRev 914, 923
[113] Opinion of AG Tizzano, Case C-442/02 *CaixaBank France*, [2004] EU:C:2004:586, para.63

economic integration. Accordingly, we might expect to see judicial approaches to these qualitatively different types of interference with free movement distinguished from adjudicative models employed when a restriction of free movement denoted protectionism. However, the analysis in the next section will reveal that, while the Court has taken substantive steps to recognise the changed landscape of conflicts between free movement and national law, the structure of judicial decision-making does not adequately reflect this shift.

3. Increasing the free movement bias: the maintenance and reinforcement of a structural preference for free movement in spite of qualitatively different interactions

This section will argue that the evolution in the scope of the free movement provisions, which has contributed to a surge in conflicts between free movement and fundamental rights, has ironically also crystallised the two-stage breach/justification model, which prioritises free movement over competing law and policy. Nonetheless, there are other contributors to this phenomenon and this section should be read with the understanding that much of the general analysis of the two-stage approach, discussed in detail for the first time here, applies equally to the other arms of our constitutional trinity, namely direct effect and citizenship, discussed in chapters three and four. Here, we acknowledge, first, that the CJEU has recognised the qualitative difference in the conflicts that can now take place between free movement and national law and policy in its substantive approach to justifications. However, there is an historical hangover, from the days when the adjudicative process was focused on tackling protectionism, in the language used in relation to justifications and in the structure of judicial decision-making, which nevertheless makes it more difficult for fundamental rights to prevail.

Moreover, while the Court has maintained a strict approach to *justifications*, expansion in the material and personal scope of free movement has inevitably made it easier for a *breach* of EU law to be established. This results in a growing evidentiary gap between breach and justification. Specifically, the burden on those wishing to demonstrate a breach of Union law is generally decreasing. A very minimal impediment to free movement, with no empirically proven, or even actual, deterrent effects on the exercise of free movement will often establish *prima facie* wrongful conduct. Consequently, the permissibility of Member State pursuit, or individual exercise, of fundamental rights falls to be assessed entirely at the justification stage

where it is exposed to proportionality questions not imposed on free movement. In its final subsection, the section develops the critique, sown in chapter one, that assessing fundamental rights at the justification stage triggers an 'impact trio' of practical limitations on their realisation.

3.1. *Suffering from an historic hangover: the maintenance of a strict proportionality test for qualitatively different breaches of free movement*

As section 2.1.2 demonstrated, when the Court, in *Cassis*, brought dual regulatory burdens within the material scope of Article 34 TFEU, it created interactions between free movement and a diverse range of legitimate domestic policy goals, not targeted at undermining the internal market but capable of inhibiting its completion. For instance, each Member State had, independently, enacted rules to protect the position of consumers in light of their generally weaker position on the market place. These rules were not a deliberate attack on foreign goods. The disadvantage they created for importers lay in the fact that the Member State of production implemented this legitimate policy goal differently from the importing Member State. Although the Treaty drafters had envisaged, through the exhaustive lists contained in the derogating provisions,[114] that, in some instances, restrictions on free movement might be the result of the pursuit of other valid goals, the introduction of DRBs caused free movement to interact with Member State endeavours, such as consumer protection, that did not feature in these lists. Consequently, in apparent acknowledgement of the qualitatively different nature of DRBs, the Court accepted that where measures were not distinctly applicable, Member States could justify restrictions on free movement by reference to the mandatory requirements facing a State, which included, but were not limited to: fiscal supervision, consumer protection, and the fairness of commercial transactions. Thus, the Court had catered, substantively, for the changed free movement/domestic restriction dynamic post-*Cassis*.

However, in other ways *Cassis* maintained, and was inherently built upon, an intrinsic preference for free movement. First, the language surrounding the substantive expansion of potential justifications nevertheless connotes the procedural subjugation of national rules: they must be 'mandatory' or, in relation to the other freedoms, 'imperative' or 'overriding'.

[114] On the exhaustive nature of the Treaty derogations see: Case 113/80 *Commission v Ireland* [1981] EU:C:1981:139; Case 177/83 *Kohl v Ringelhan* [1984] EU:C:1984:334

Further, the finding, in *Cassis*, that domestic rules must be *necessary* in order to achieve the relevant aim, introduces the same basic proportionality test for the justification of DRBs that is applied to protectionist or directly discriminatory policy, as part of a two-stage breach/justification assessment. This was confirmed across the four freedoms, and applied to rules restricting market access, in *Gebhard*.[115] Here, the Court explicitly provided the applicable test in this context. Measures had to operate in a non-discriminatory manner; be suitable for attaining the objective pursued; and must not go beyond what is necessary to achieve it.[116] Yet, as we have seen, the expansion of the scope of the market freedoms creates more opportunity for conflict between them and fundamental rights. Accordingly, the retention of the two-stage model in this context exposes fundamental rights to further structural subjugation. Indeed, we see the *Gebhard* formula applied in, for example, all of the fundamental rights cases discussed in chapter one, namely, *Familiapress*,[117] *Omega*,[118] *Viking*,[119] *Laval*,[120] *Rüffert*,[121] *Commission v Luxembourg*[122] and *Dynamic Medien*,[123] all of which concern indistinctly applicable measures or rules restricting market access.[124] The effects of this structural prioritisation of free movement will be explored in section 3.3. For now, we can already see that they are disadvantaged by their procedural presentation as *prima facie* unlawful and their consequent exposure to the standard proportionality questions of 'necessity' and 'suitability', which is often assessed by reference to whether outcomes less restrictive of free movement are available.[125]

Thus, despite a substantive recognition of the qualitatively different nature of the national rules with which free movement interacts in the post-*Cassis* era, there remains an historical hangover in terms of the *procedure* used for adjudicating conflict. The next subsection argues that, while a restrictive proportionality assessment has been retained for justifications post-*Cassis*, the evolution of free movement beyond instances of discrimination has necessarily and simultaneously rendered it progressively easier to establish a breach of free movement.

[115] Case C-55/94 *Gebhard*, n.46
[116] Para.37
[117] Case C-368/95 *Familiapress*, n.15
[118] Case C-36/02 *Omega*, n.33
[119] Case C-438/05 *Viking*, n.54
[120] Case C-341/05 *Laval*, n.21
[121] Case C-346/06 *Rüffert* [2008] EU:C:2008:189
[122] Case C-319/06 *Commission v Luxembourg* [2008] EU:C:2008:350
[123] C-244/06 *Dynamic Medien*, n.3
[124] Although the rigorousness of application is variable, see ch.1, s.3.1
[125] Joined Case C-197/11 and C-203/11 *Libert*, n.48; Case 179/85 *Commission v Germany (pétillant de raisin)* [1986] EU:C:1986:466

This ever-widening evidentiary gap increases the structural bias in favour of free movement and against fundamental rights since applicants pursuing free movement have broad opportunities to establish a presumption of illegality in relation to the protection or exercise of fundamental rights by Member States or individuals. Certainly, there is no consideration, at the breach stage, of the impact of the pursuit of free movement on the exercise of fundamental rights. The weighing of these competing norms takes place at the justification stage where judicial focus is solely on assessing whether fundamental rights can overcome a *prima facie* unlawful breach of free movement. Thus, fundamental rights can be exposed to a restrictive proportionality assessment even against broadly-defined and minimal restrictions on free movement.

3.2. *The increased 'breachability' of the free movement provisions*

The evidentiary burden placed on applicants wishing to establish a breach of free movement is necessarily lowered when the concept of a breach is broadened. As we have seen, it will no longer be necessary for a foreign Member State trader to demonstrate that a receiving Member State is *directly* discriminating against her/him. In the wake of the market access test, she/he will not even have to display the differential impact of host State rules on her/him as compared with domestic traders. Thus, much of the second section of this chapter is equally relevant to the arguments in this subsection and those findings will not be repeated. Instead, we will focus, here, on the evidential requirements placed on applicants wishing to establish a breach of the free movement provisions. The subsection will argue that the existence of concrete barriers to free movement is largely irrelevant to the question of breach. Individuals are able to challenge Member State rules, including those that seek to protect fundamental rights, regardless of whether or not they have actually been deterred from crossing borders – arguably the whole purpose of free movement tools within a common market - and irrespective of whether their market position is affected by the existence of potential barriers to trade. Consequently, diverse areas of complex national law and policy can be scrutinised, and subsequently altered, where they do not impose the fewest restrictions possible on free movement, even where its exercise has been restricted to a very limited degree.

The low evidential burden for establishing a breach of the free movement of goods originates in the Court's definition of a 'measure equivalent to a quantitative restriction on goods',

which is prohibited by Article 34 TFEU. In its seminal *Dassonville* decision, the CJEU defined as an MEQR, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade…'[126] Thus, the question of whether importation of goods was *actually* hindered was irrelevant as long as there was potential for impediment. Indeed, many cases involve applicants who are already operating in a host State, regardless of that State's rules, though they might not always do so under their preferred market conditions. Thus, in *Cowan*,[127] concerning services, the restriction of compensatory awards to victims of physical assault to those resident in France, constituted a breach of Article 56 TFEU. This decision appears fair; certainly Cowan himself might be discouraged from visiting France following his experiences there. But can it really be said that service recipients generally, or even Cowan specifically, would be deterred from seeking services in France on the sole basis that they would not be entitled to compensation should they be the victim of a violent crime? Nevertheless, the Court has maintained this approach such that non-discrimination is a stand-alone principle regardless of concrete deterrent effects.[128]

Similarly, in *Bickel*,[129] a German and an Austrian successfully challenged as a restriction of Article 56 TFEU an Italian rule, which provided that criminal proceedings in the bi-lingual German/Italian Bolzano region could be conducted in German but limited its application to residents of that region. As service recipients, both individuals fell within the personal scope of Article 56. Moreover, since Italian nationals were more likely to be resident in Bolzano than other German speakers, the rule was indirectly discriminatory and accordingly fell within the material scope of that provision. There was no assessment by the Court of whether the Italian measure actually deterred citizens from seeking services in Italy. Indeed, like in *Cowan*, it is arguably unlikely that German speakers would be discouraged from receiving services in Bolzano on the sole basis that, should they be arrested, they would face Court proceedings in Italian. At the justification stage, Italy had argued that it wished to recognise the ethnic and cultural identity of its German-speaking population by allowing them to speak German, wherever possible, in their interactions with the State. Accordingly, the measure can represent a manifestation of the fundamental rights of minority groups and respect for cultural

[126] Case 8/74 *Procureur du Roi v Dassonville* [1974] EU:C:1974:82
[127] Case 186/87 *Cowan* [1989] EU:C:1989:47
[128] See C. Costello, 'Market Access All Areas – The Treatment of Non-discriminatory Barriers to the Free Movement of Workers [Case Comment Case C-190/98 *Graf* EU:C:2000:49]', (2000) 27(3) LIEI 267, 271-271
[129] Case C-274/96 *Criminal proceedings against Bickel and Franz* [1998] EU:C:1998:563

and linguistic diversity.[130] Crucially, the Court did not assess the potential impact, or proportionality, of the pursuit of free movement on the protection of these fundamental rights as part of its breach analysis. At the justification stage, the Court simply acknowledged that the protection of minority groups was a legitimate aim, but then declared that there was nothing to suggest that this would be undermined if the rules were extended to cover German-speaking nationals of other Member States.[131] It was not until the Italian government expressly outlined the practical impact of the extension in the subsequent case of *Rüffer* that the Court considered, in more detail, whether the protection of minorities would be encumbered by the financial and organisational implications of an increase in German-language trials.[132] The CJEU maintained that the Italian rule could not be justified since the referring court had itself admitted that the extension of the measure to non-national German speakers would impose no new organisational burdens.[133] In relation to additional costs, Member States could not rely on aims of a purely economic nature to justify restrictions on free movement.[134]

It could, therefore, be argued that the Court's approach in *Bickel* was not problematic from a fundamental rights perspective. And yet, it is intrinsically worrying that the low evidentiary burden at the breach stage contains no consideration of the potential impact, and proportionality, of a finding of a violation of free movement on a Member States' ability to meet its fundamental rights obligations. The onus is, instead, on the Member State to highlight this at the justification stage where the focus is, nevertheless, on the proportionality of protecting fundamental rights in light of their restriction of free movement. Moreover, the Court's rejection, in *Rüffer*, of additional costs as a justification since they were of a 'purely economic nature' underappreciates the budgetary considerations that are inherent in meeting the positive obligations of programmatic fundamental rights.[135] Indeed, if protective schemes prove particularly costly, they might be abandoned altogether. This will be discussed in more detail, as a broader issue, in section 3.3.3.

[130] See Arts.21 and 22 CFR
[131] Para.29
[132] Case C-322/13 *Rüffer v Pokorná* [2014] EU:C:2014:189. The Court did note, in *Bickel*, that Mr. Bickel and Mr. Franz had argued 'without contradiction' that their trials could proceed in German 'without additional complication or cost' (n.129, para.30).
[133] Para.24
[134] Para.25
[135] Although, there is an emerging case-law that permits as a justification 'the risk of seriously undermining the social security system', Case C-368/98 *Vanbraekel a.o. v ANMC* [2001] EU:C:2001:400, para.47; Joined Cases C-396, 419, 450/05 *Habelt* [2007] EU:C:2007:810

The low evidentiary burden in *Cowan* and *Bickel*, containing no consideration of deterrent effects in real-terms, is arguably justifiable by reference to the fact that non-discrimination is a fundamental principle of the Union, especially in light of the introduction of Union citizenship.[136] Nevertheless, '*per se* restrictions' necessarily reduce the evidentiary burden for establishing obstacles to free movement and consequently expose a greater quantity of fundamental rights to challenge as restrictions of EU law. This can also be seen in relation to DRBs,[137] where the CJEU adopts a *per se* approach with respect to product requirements i.e. rules concerning *inter alia* the designation, composition, size, weight and packaging of goods. Clearly, having to alter one's product in order to enter another Member State's market can have significant, restrictive effects on movement. However, the *per se* approach removes any requirement to examine the actual extent of limitations on free movement before a restriction is found. This is problematic in cases where DRBs reflect Member State efforts to protect fundamental rights because relevant domestic rules will be considered *prima facie* unlawful breaches of EU law, even where obstacles to free movement might be quite minimal. Since, by the justification stage, a restriction on free movement is already established, the emphasis turns to the proportionality of fundamental rights restrictions on free movement. No comparison is made between the size of the impediment placed on producers/importers, on the one hand, and the effect of allowing goods to enter the host State market unhindered on fundamental rights protection, on the other. The focus is on whether fundamental rights impose the fewest possible restrictions on free movement. As the following subsections will detail, this might require Member States to alter their methods of safeguarding fundamental rights protection, impacting on the effectiveness or level of protection. And yet, the obstacles to free movement, which trigger this change, only need be potential, indirect, or slight.

Keck offered some opportunity for closing this evidentiary gap because, in the context of selling arrangements, it placed the burden of proof back on foreign traders to *demonstrate* that they were being treated differently in law or in fact from domestic producers. For instance, the Court stated in *De Agostini,* that, as a selling arrangement, a prohibition on television advertising did not breach Article 34 TFEU unless it was shown that the ban did not affect in the same manner, in fact and in law, the marketing of national products compared with those

[136] Art.2 TEU; Art.21 TFEU

[137] There, of course, remains disagreement in the literature as to whether product requirements are discriminatory in effect and also offend the principle of non-discrimination: N. Bernard, n.4, 92; D. Chalmers, 'Repackaging the Internal Market – the ramifications of the *Keck* judgment', (1994) 19(4) ELRev 385, 394

coming from other Member States.[138] This has led Barnard to argue that, in contrast with product requirements, there is a presumption in relation to selling arrangements that they do not hinder market access 'and the trader will have to work very hard to rebut this presumption, possibly by introducing statistical or other evidence'.[139]

However, *De Agostini* itself seems to undermine this conclusion. Although final application was left to the referring court, the CJEU appeared, in that case, to accept on face value that television advertising was the only way for De Agostini to penetrate the Swedish market.[140] This implies that De Agostini was at a disadvantage perhaps because domestic traders could penetrate the market in other ways, but no explicit assessment was made in this regard. While this was the responsibility of the national court, which could have conducted a rigorous analysis of De Agostini's factual situation, the burden of proof to which Barnard refers, appears to have been discharged with relative ease. Moreover, in *Gourmet*, the CJEU conducted its own assessment.[141] Examining the effects of another Swedish advertising ban, relating to alcohol, the Court declared that, since the consumption of alcohol is linked to local habits, it was not necessary to conduct a 'precise analysis' to conclude that a prohibition of alcohol advertising is liable to impede access to the market for imported goods more than domestic products, with which consumers are instantly more familiar.[142] However, if the Court's reasoning lies in consumer familiarity, surely the penetration of new products on to the market is similarly, or equally, difficult for both domestic and imported goods?[143] Further, it will be recalled that this finding of a restriction in *Gourmet* exposed Member State rules that can be viewed as targeting the fundamental right to health, to a justification analysis, since they were a *prima facie* breach of EU law. This was also the case in *De Agostini*, which also concerned efforts to safeguard the rights of the child. Indeed, Wilsher has argued that a higher, more precise evidentiary burden should operate at the breach stage precisely because of free movement's potential effects on other legitimate objectives:

[138] Joined Cases C-34-36/95 *De Agostini*, n.42, para.40
[139] C. Barnard, 'Fitting the Remaining Pieces into the Goods and Persons Jigsaw?' (2001) 26(1) ELRev 35, 45
[140] Para.43
[141] Case C-405/98 *Gourmet*, n.45
[142] Para.21
[143] Unless the Court was focusing on consumer habits in respect of generic products, not produced in the receiving State. Thus, it might be harder for French cognac generally to penetrate the Swedish market than it would a new brand of Swedish vodka. This issue has been recognised in relation to Art.110(2) TFEU, which prohibits indirect protectionism through internal taxation. See Case 168/78 *Commission v France* [1980] EU:C:1980:51

[The Court] has found discrimination based on judicial hunches or intuitions rather than clear criteria and objective evidence about conditions of competition in the product markets… Only where a trader can demonstrate that a restriction is truly arbitrary should [Article 34 TFEU] bite. For many non-product rules this will rightly be difficult to do because such rules pursue broad policy goals that are largely non-justiciable.[144]

The introduction of a market access test has removed the question of discrimination altogether, increasing the pertinence of Wilsher's critique. Returning to *Gourmet*, this time in the context of services, the Court held that the Swedish ban constituted a restriction on Article 56 TFEU, since foreign producers would not be able to use Swedish advertising service providers to market alcohol. This was established by reference to the 'international nature' of the advertising market,[145] with no empirical examination of whether any foreign advertisers actually sought to advertise on the Swedish market. The fact that this presumption might prove true does not detract from the fact that empirical evidence is rarely needed to establish a breach of free movement. A similar approach can be seen in *Libert*.[146] In that case, Flemish rules required, for certain target communes that there be a 'sufficient connection' between the area and proposed transferees before property could be conveyed. Likewise, property developers had to fulfil a 'social obligation' by making certain of their units available for social housing, or make payment in kind. Both measures were arguably targeted at providing accessing to housing, a fundamental right pursuant to Article 34 CFR. The 'sufficient connection' requirement was found to be in breach of, *inter alia,* Article 56 TFEU, since estate agents could not offer their services to 'just any Union citizen', and Article 63 TFEU because a prior authorisation assessment was a restriction on capital movements *per se*.[147] The 'social obligation' also constituted a restriction of capital since investors could 'not freely use the land for the purposes for which they wished to acquire it'.[148] Yet, there was no concrete assessment of whether estate agents' business would really be affected by the 'sufficient connection test' or whether investors would genuinely be deterred by the rigmarole of a prior authorisation procedure. For instance, how many target *communes* were there? What percentage of an estate agent's annual business would be affected by the fact that they were restricted as to whom they could offer their services, and, in any case, only in relation to *purchases* and *long-term* rents, in *particular* communes? Although the Advocate General did

[144] D. Wilsher, 'Does Keck Discrimination Make Any Sense? An Assessment of the Non-Discrimination Principle within the European Single Market', (2008) 33(1) ELRev 3
[145] N.45, para.39
[146] Joined Cases C-197/11 and C-203/11 *Libert*, n.48
[147] Paras.42-44
[148] Para.66

in fact acknowledge the pertinence of the number of target communes, this was only relevant at the justification stage, placing the evidential burden on the Member State.[149] In any case, neither the Advocate General, nor the Court, actually took this into account as part of their justification analyses.[150]

Of course, the Court has frequently made plain that it does not apply a *de minimis* threshold in its examination of whether there has been a breach of free movement.[151] For the Court, evidence that potentially restrictive rules are not affecting foreign traders, who have no interest in the domestic market or who are not being deterred, only demonstrates the *status quo* and not the potential for further cross-border trade once a measure has been removed. Some commentators have argued convincingly against the introduction of quantitative empirical analysis for establishing a breach of free movement. For instance, Davies posits that free movement rights are often exercised by smaller actors[152] who are not able to provide complex economic assessments.[153] Nevertheless, as section 3.3 will demonstrate, the Court frequently imposes similar empirical obstacles at the justification stage, requiring Member States or private individuals to provide in-depth statistical data to support their fundamental rights justifications. Other writers have argued that a *de minimis* test does operate within free movement but is *qualitative* in nature. Specifically, Nic Shuibhne points to the Court's focus on the *absolute* prohibition of use of motorcycle trailers in finding a restriction on market access in *Commission v Italy*,[154] and the fact that use of personal watercraft was 'very limited'[155] in *Mickelsson v Roos*.[156] Such thresholds can also be viewed in the free movement of persons case-law, where the Court has imposed a test of 'serious inconvenience'.[157]

[149] Joined Cases C-197/11 and C-203/11 *Libert* , Opinion of AG Mazák, EU:C:2012:621, paras.26-27
[150] This low evidentiary burden can of course be beneficial to fundamental rights when they run congruent to free movement. Thus, in Case C-60/00 *Carpenter* (n.57), the Court found that the deportation of an EU citizen's third country national wife would be detrimental to his ability to provide cross-border services, with no concrete elaboration as to *how* or *why*, this might be the case. Although there was a reference to Mrs. Carpenter's provision of childcare, this was part of a separate discussion as to whether the couple's family life was genuine, para.44
[151] Joined Cases 177/ 82 and 178/82 *Van de Haar* [1984] EU:C:1984:144; Case 269/83 *Commission v France* [1985] EU:C:1985:115; Case 67/97 *Bluhme* [1998] EU:C:1998:584. This is not the approach of the Court in the area of tax: Case C-383/01 *De Danske Bilimportører* [2003] EU:C:2003:352.
[152] By comparison with competition law, which does impose quantitative thresholds.
[153] P. Oliver, 'Some further reflections on the scope of Articles 28–30 (ex 30–36) EC,' (1999) 36(4) CMLRev 783, 799; see also G Davies, 'The Court's jurisprudence on free movement of goods: pragmatic presumptions, not philosophical principles' (2012) European Journal of Consumer Law 25, 31
[154] Case C-110/05 *Commission v* Italy, n.50, para.56
[155] Case C-42/05 *Mickelsson and Roos*, n.52, para.27
[156] Nic Shuibhne, n.8, 253-254
[157] Case C-148/02 *Garcia Avello* [2003] EU:C:2003:539, para.36; Case C-353/06 *Grunkin and Paul* [2008] EU:C:2008:559, para.23

However, she notes also that the height of the qualitative threshold in the product-use cases is already lowering. Thus, in *Bonnarde*, the Court remarked that the requirement that motor vehicles have registration documents to qualify for ecological subsidies 'may influence' consumer behaviour and therefore restrict market access.[158] Nic Shuibhne emphasises that this requirement would not 'greatly restrict' product use, as appeared to be the requirement in *Commission v Italy* and *Mickelsson and Roos*.[159] Crucially, for our purposes, the systematic application of the *Gebhard* formula to fundamental rights at the justification stage, and their subsequent exposure to strict proportionality assessment, is not matched by equivalent examination of free movement at the breach stage. This remains true even in the light of scattered examples in the case-law of a gradually lowering qualitative *de minimis* threshold for breach.

This subsection has demonstrated the low evidential obstacles facing those wishing to establish a breach of free movement. As well as the broad approach to defining obstacles to free movement, the evidentiary burden imposed is generally shallow. Consequently, an increasing number of Member State measures, including those targeted at fundamental rights protection, are found to be *prima facie* unlawful restrictions of free movement, which must justify themselves according to the requirements of proportionality. It is to the practical consequences of this procedural eventuality that we now turn.

3.3. *The practical implications of these developments on the protection and pursuit of fundamental rights*

It might be argued that the evolutions that have taken place within free movement, discussed above, are not particularly problematic from a fundamental rights perspective. Yes, expansion in the material and personal scope of free movement has caused it to interact more frequently with fundamental rights. And yes, the Court has retained a two-stage approach to these conflicts that was historically used for tackling protectionism, leading to a broad and shallow burden of proof for establishing breach. But, the very existence of a justification stage precludes the conclusion that free movement will always 'trump' fundamental rights. Thus,

[158] Case C-443/10 *Bonnarde v Agence de Services et de Paiement* [2011] EU:C:2011:641
[159] N.8, 233-234. At 254, she doubts whether *Bonnarde* can be viewed as a reliable decision but considers the lack of attention to detail in this area of the law to be itself 'a source of dismay'.

the exposure of more fundamental rights to interaction with free movement cannot necessarily be automatically viewed as problematic in terms of fundamental rights protection. Indeed, we saw, in chapter one, that there are several cases in which fundamental rights, processed through the two-stage approach, have prevailed over free movement.[160]

However, this stance is contestable for a number of reasons. First, as chapter one demonstrated, an adjudicative framework that presents the protection or exercise of fundamental rights as *prima facie* wrongful conduct, which must be *defended* in light of the restrictions they place on free movement, undermines the very fundamentality of fundamental rights, from theoretical perspectives and is ill-suited to the Union's contemporary constitutional commitment to respecting fundamental rights. Chapter one also outlined an 'impact trio' of practical effects that the two-stage approach triggers in respect of Member State fundamental rights standards. Since review of domestic fundamental rights is increasingly possible as a result of the extension of the material and personal scope of the free movement provisions, and the Court's choice to maintain the two-stage structure in this context, it is appropriate to develop this analysis further here.

To lay the foundations for this analysis, the subsection will, however, first detail the often significant evidentiary hurdles that fundamental rights face as part of the two-stage process, in a practical sense. As derogations from 'fundamental principles' of the Union, justifications, including those relating to fundamental rights, must be interpreted strictly. We have already seen that the *Gebhard* formula imposes questions of 'suitability' and 'necessity' at the justifications stage. Here, we will examine what evidence the Court requires in this regard. It will be demonstrated that, in stark contrast to the general lack of *de minimis* at the breach stage, at the justification phase Member States/individuals are required to show that the protection of fundamental rights are under 'serious threat'. Moreover, they are often required to provide detailed statistical data in this regard, which might, nevertheless, be rejected by the Court.

3.3.1. Justifying fundamental rights protection: the requirement of a 'serious threat'.

[160] Case C-36/02 *Omega*, n.33; Case C-244/06 *Dynamic Medien*, n.3; Case C-112/00 *Schmidberger*, n.70

It is well-established in the case-law that, as derogations from a 'fundamental principle' of the Union, measures restricting free movement should be interpreted narrowly.[161] A two-stage breach/justification framework, which establishes first a breach and then a justification, naturally lends itself to, and encourages, such an approach. As free movement has expanded to interact more frequently with fundamental rights, retaining the use of the two-stage model, this stance has been transferred into these new types of conflict. Thus, in *Omega*, the Court stated that public policy, which in this case concerned the safeguarding of human dignity, 'particularly as a justification for a derogation from the fundamental principle to provide services, must be interpreted strictly'.[162] This accordingly imposes an evidential threshold not (usually) faced by free movement. For instance, in *Omega* itself, the Court declared that 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.[163] This phrase was repeated verbatim by the CJEU in *Commission v Luxembourg*, concerning worker protection.[164] In fact, the Court referenced its case-law on public order legislation which it had held must be 'so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the territory…'[165] Similarly, in *Viking*, exercise of the fundamental right to strike with the aim of protecting workers was only permissible if jobs or conditions of employment were 'jeopardised or under serious threat'.[166]

Although the stringency of application with respect to these qualitative thresholds has been variable,[167] the Court has repeatedly required Member States to provide extensive statistical data to support their claims that fundamental rights protection is under 'serious threat'. Thus, in *Commission v Luxembourg*, the CJEU not only stated that the reasons invoked by Member States to justify derogations from free movement 'must be accompanied by appropriate

[161] Case C-141/07 *Commission v Germany* [2008] EU:C:2008:492; Case 13/68 *Salgoil* [1968] EU:C:1968:54; Case C-387/11 *Commission v Belgium* [2012] EU:C:2012:670
[162] Case C-36/02 *Omega*, n.33, para.30; Case C-319/06 *Commission v Luxembourg*, n.122, para.30.
[163] Ibid
[164] Case C-319/06 *Commission v Luxembourg*, n.122, para.50
[165] Ibid, para.29
[166] Case C-438/05 *Viking*, n.54, para.81
[167] For instance, despite the Court's language in *Omega*, considerable latitude was granted to the Member State. See ch.1, s.3.1. The application of the proportionality test in *Italian Trailers* and *Mickelsson and Roos* was also extraordinarily light-touch. Since the Court was pushing the outer limits of the material scope of free movement in these cases, its 'benevolent' proportionality assessment could be for 'instrumental rather than evidential reasons'. See N. Nic Shuibhne and M. Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50(4) CMLRev 965, 995-995, who are also broadly critical of incoherent applications of the *Gebhard* formula.

evidence'.[168] It also declared that 'merely cit[ing] in a general manner' the objective of worker protection, in this regard, was insufficient. Assertions will not satisfy the relevant standard of proof.[169] In *Commission v Austria*, that Member State sought to derogate from the free movement provisions in order to prevent risk to the financial equilibrium of its education system. This represents a practical consideration for Member States when they design programmes for securing the fundamental right to education.[170] Nevertheless, the Court emphasised that, in order to derogate from the fundamental principle of free movement of persons, Member States were required 'to show in each individual case that their rules are necessary and proportionate…accompanied by…specific evidence substantiating its arguments'.[171] Although Austria had maintained that the number of students registering for medical courses on its territory could be five times the number of available places, it had no figures in relation to other courses. Consequently, the Court held that Austria had failed to demonstrate that its education system was in jeopardy.[172]

We saw, in section 3.2, that reasons of a 'purely economic nature' are not generally available as potential derogations from free movement, and the impact that this can have on fundamental rights. As *Commission v Austria* demonstrates, there is, in fact, an emerging case-law, in which the Court is willing to consider the risk posed to the financial balance of social security systems.[173] This might seem encouraging from a fundamental rights perspective, but the evidentiary burden placed on Member States, in relation to what are essentially decisions of policy, arguably undermines this. As Nic Shuibhne and Maci argue, 'if a defendant State submits empirically-grounded arguments about why and how it chooses to allocate resources, on what basis should those decisions be assessed, let alone overturned, by any court – EU or national?'[174] For instance, if a Member State wishes to justify its refusal to reimburse an individual for medical services received abroad because of the impact it will have on the operation of its health services overall, 'how can States demonstrate – or more likely, project – to a sufficiently rigorous degree the knock-on, systemic effects' in this

[168] Case C-319/06 *Commission v Luxembourg*, n.122, para. 51.
[169] See also Case C-543/08 *Commission v Portugal* [2010] EU:C:2010:669, para.87 and, for discussion, Nic Shuibhne and Maci, n.167, 980-982
[170] Art.14 CFR
[171] Case C-147/03 *Commission v Austria* [2005] EU:C:2005:427, para.63
[172] Ibid, paras.64-65
[173] See also Case C-368/98 *Vanbraekel*, n.135; see also the Opinion of AG Sharpston in Joined Case C-523/11 and C-585/11 *Prinz and Seeberger* [2013] EU:C:2013:90, para.61-65, although the CJEU took a different approach (EU:C:2013:524).
[174] N.167, 1002

regard?[175] In other fundamental rights areas, where furnishing statistical evidence might be easier, this will not necessarily lead to a Member State's measure being justified in practice, in any case. Thus, in *Petillant de Raisin*, Germany tried to justify its restrictions on the use of champagne-style bottles for other drinks by presenting a survey in which 75% of participants, having been shown a photograph of such a bottle, believed that it contained champagne or sparkling wine. Even where this bottle featured a clear label, stating that it contained fermented fruit juice, 50% of people still though it was a picture of champagne. Nevertheless, the Court held that clear labelling would secure consumer protection and in a way less restrictive of free movement.[176]

When the discussion in this subsection is contrasted with our assessment of the evidentiary hurdles imposed on those trying to establish a breach of free movement, we can see that, in evidential terms, the protection of fundamental rights is clearly disadvantaged by its examination at the justification phase of the two-stage approach. Next, we will consider what the consequences of this can be in practical terms, focusing first on the potential for underappreciation in relation to the idiosyncratic fundamental rights needs of the Member States.

3.3.2. *Lower levels of fundamental rights protection and a general under-appreciation of idiosyncratic Member State fundamental rights needs*

Aside from the high evidential thresholds discussed above, it could be argued that the obligation at the justification stage, that Member States demonstrate the 'necessity' of their fundamental rights measures, does not undermine their protection. Once a domestic provision achieves what is necessary to safeguard fundamental rights, it has, by definition, done enough. However, that argument is undermined when we consider that necessity is assessed through a free movement lens. The use of a model that asks whether there are measures 'less restrictive of free movement' available, to determine the necessity of national fundamental rights rules can, in fact, result in a lowering of Member State fundamental rights protection in real terms.

[175] Ibid
[176] Case 179/85 *Commission v Germany (pétillant de raisin)* [1986] EU:C:1986:466. Germany's survey detailed by H-C von Heydebrand u.d. Lasa, 'Free movement of foodstuffs, consumer protection and food standards in the European Community: has the Court of Justice got it wrong?' (1991) 16(5) ELRev 391, 408

Moreover, fundamental rights needs that are peculiar to certain Member States can be overlooked by determining necessity by reference to free movement.

This issue is exemplified in the case-law on vulnerable consumers. The Court has frequently held that consumers can be protected from potential confusion, when purchasing goods, by labelling that, for instance, indicates the content and composition of, or manufacturing methods used for, the given product.[177] The Court's stance is that the 'reasonably circumspect' consumer reads product labels. Since Member State measures for consumer protection have, for instance, included different compositional requirements,[178] new product designations,[179] or entirely altered packaging,[180] labelling is clearly less restrictive of free movement. However, it is submitted that this does not automatically render Member State rules 'unnecessary', from a fundamental rights perspective. Specifically, this approach neglects to consider the realities of consumer behaviour or arguably legitimate Member State desire to protect vulnerable consumers. We have already seen that in the *Pétillant de Raisin* case, Germany presented evidence that at least 50% of consumers do not read labels. As von Heydebrand u.d. Lasa points out, 'comparable to the small-print on a standard-form contract, the list of ingredients and other information on the label are in many instances plainly not read, even if the foodstuff is bought for the first time'.[181] Accordingly, labelling may be a less restrictive, but not necessarily equally effective, form of consumer protection.

In *Mars*, a German rule, which prevented packaging declaring that the consumer was getting '10% free' from being over 10% of the size of the chocolate bar, could not be justified by reference to consumer protection. For the Court, 'reasonably circumspect consumers' would not necessarily assume there was a link between the size of the publicity and the product enlargement.[182] Thus, as Weatherill notes:

> The Court's formulation admits by implication that it is concerned to improve the freedom of choice of a particular group of consumers, the "reasonably circumspect", who have no need of…regulatory mollycoddling.

[177] Case 261/81 *Rau* [1982] EU:C:1982:382; Case C-179/85 *Pétillant de Raisin*, n.176
[178] Case C-120/78 *'Cassis de Dijon*', n.25
[179] Case 178/84 *Commission v Germany* [1987] EU:C:1987:126
[180] Case 261/81 *Rau*, n.177
[181] N.176, 402
[182] Case C-470/93 *Mars*, n.29, para.24

The ruling insists on the relaxation of the grip of national laws [regarding] a consumer more gullible than the European Court is prepared to acknowledge as deserving protection.[183]

Moreover, even 'reasonably circumspect' consumers are unlikely to read labels on generic products about which, due to their generic quality, consumers have established expectations. Thus, in *Canadane Cheese,*[184] Greece argued that the majority of consumers would assume that feta cheese was made in Greece, from goats' or sheep's milk, using the processes associated with feta. They would be unlikely to read a label that revealed it was actually made in Denmark, from cow's milk, using processes that gave it a different flavour and texture. The Court held that, by their very nature, generic products, such as feta, could not have strict compositional rules. And yet, it was these very compositional requirements that made feta generic.

The *Clinique* judgment also demonstrates that the Court's global approach to the 'reasonably circumspect' consumer will often neglect to consider the inevitable idiosyncrasies that remain within a region that is still culturally and linguistically diverse.[185] Germany banned the sale of beauty products under the brand name 'Clinique' due to its similarities with the German word '*Klinik*', meaning hospital, believing that some consumers would assume that the beauty products had medicinal qualities. The Advocate General was willing to accept that 'there may be specific differences in linguistic, cultural and social conditions which have the result that something which does not mislead consumers in one country may do so in another'.[186] However, the Court held that the measure could not be justified since the name 'Clinique' was used in other countries where it apparently did not mislead consumers.[187] This somewhat misses the linguistic point that is the very basis of the German rule. As Weatherill remarks, the Court's reasoning 'invites the retort that one [would not expect consumers in other Member States to be misled] if the issue is peculiar to the German language'. Consequently, Weatherill finds the decision unsatisfactory by virtue of its oversimplification, its neglect of

[183] S. Weatherill, 'Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation', (1999) 36 CMLRev 51, 57; see also, H. Unberath and A. Johnston, 'The Double-Headed Approach of the ECJ Concerning Consumer Protection', (2007) 44 CMLRev 1237, 1250-1251. In some cases the Court appears to allow for the protection of the particularly vulnerable e.g. Case C-382/87 *Buet,* n.38; Case 286/81 *Ooesthoek* [1982] EU:C:1982:438. For analysis, see Weatherill, this note, 57-58, 69-70
[184] Case C-317/95 *Canandane Cheese Trading* [1997] EU:C:1997:393
[185] Case C-315/92 *Clinique*, n.29
[186] Ibid, (Opinion of AG Gulmann: EU:C:1993:823), para.18
[187] Para.21

the question of consumer confusion and of the differences between consumers across Europe.[188]

There is evidence of the Court's lack of appreciation for Member State diversity beyond the case-law on vulnerable consumers. In *Laval*, collective action could not be used by Swedish trade unions to force Latvian service providers to negotiate over pay. The Court considered that there was a lack of sufficiently precise and accessible rules in Sweden in this regard. This rendered it impossible or excessively difficult in practice for service providers to determine their obligations on minimum pay.[189] Absent from this reasoning is the fact that this lack of precision is borne from Sweden's idiosyncratic approach to minimum pay, whereby there can be no set rules, since minimum pay is negotiated at the workplace on the basis of the skills, experience and qualifications of the individual worker. Moreover, determination of the level of pay remains within the legislative competence of the Member States.[190] It might seem, then, that it would be advisable for the CJEU to leave the final application of Union law to the national courts. Domestic judges are likely to be more cognisant of the factual implications of less restrictive alternatives. However, since this often poses complex questions of policy, inextricably linked to political choice, this might also be an unsuitable or extremely difficult task for the national judge. For instance, in *Familiapress*, the CJEU left it to the national court to determine whether Austria's ban on prize draws in magazines could be justified by the need to protect the fundamental right to freedom of expression, in light of particular issues relating to the market dominance of certain publications in that State. As Weatherill remarks, 'one might forgive a national judge from looking aghast at the political judgments thrust upon him or her by the Court' here.[191]

Viewing the question of necessity through a free movement lens can also reduce the effectiveness of those fundamental rights that intrinsically rely on their ability to restrict the exercise of free movement by others. It is on this issue that our analysis is now focused.

[188] N.183, 56-57.
[189] Case C-341/05 *Laval*, n.21, para.110; c.f. Case C-36/02, *Omega*, n.33 and Case C-244/06 *Dynamic Medien*, n.3 in which the CJEU showed deference to the idiosyncratic fundamental rights approaches of the Member States. For rudimentary discussion of possible reasons for this different approach, see ch.1, s.3.1.
[190] Art.153(5) TFEU.
[191] N.183, 68. Weatherill's argument that this requires the CJEU to take the lead on such matters does not address the problem of how adequately to appreciate the idiosyncratic fundamental rights needs of the Member States.

3.3.3. The inevitable contradiction between a 'least restrictive alternative' test and the inherently restrictive nature of certain fundamental rights

In its *Albany* judgment, concerning a conflict between EU competition law and a Dutch provision, which made affiliation to a designated sectoral pension fund compulsory, the Court held that 'certain restrictions of competition are inherent in collective agreements'.[192] The CJEU accepted that the social policy objectives of such agreements would be seriously undermined if social partners were subject to Article 101(1) TFEU, when seeking jointly to adopt measures to improve working conditions.[193] This led the defendant trade union in *Viking*, to argue, by analogy, that exercise of the fundamental right to strike must fall outwith the scope of Article 49 TFEU, on the freedom of establishment, since it was, by nature, restrictive of that freedom. The CJEU rejected this argument, declaring that 'it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced to a certain degree'.[194] Davies has questioned this stance, remarking that 'since collective action is intended to impose costs on employers and thus 'render less attractive' a particular course of action, it is…difficult to think of examples of meaningful collective action in a cross-border context that would not be caught by [Articles 49 and 56 TFEU].[195]

This supports the assertion in section two that the expansion in the material scope directly contributes to further interaction between free movement and fundamental rights. For present purposes, it also calls into question the suitability of a proportionality test in the context of the fundamental right to strike, and particularly one that seeks alternative approaches to protection that are less restrictive of free movement. The Court in *Viking* stated that it was for the national court to determine whether the trade union 'did not have other means at its disposal which were less restrictive of freedom of establishment'.[196] However, since the purpose of collective action is to allow employees, who are generally in the weaker social position, to impede the activities of the employer and therefore influence decision-making, this approach seems intrinsically contradictory. Thus, for Novitz:

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[192] Case C-67/96 *Albany* [1999] EU:C:1999:430, para.59
[193] Ibid
[194] Case C-438/05 *Viking*, n.54, para.52
[195] A. Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', (2008) 37(2) ILJ 126, 140
[196] Para.87

'[i]t seems highly problematic that the legality of unions engaging in industrial action…depend[s] on whether…it would have been possible to achieve their objectives in a way which was, perhaps marginally, less restrictive of the free movement rights of, in many cases, the very enterprise with which they are in dispute'.[197]

Moreover, since the trade union in *Viking* was exercising its fundamental right to strike in order to persuade the employer not to exercise free movement rights, any collective action less restrictive of free movement would inevitably reduce the effectiveness of exercising that fundamental right. As Davies points out, there is a risk that this will not be recognised in the Court's 'least restrictive alternative' approach. For instance:

…while a leafleting campaign might be less restrictive of the employer's free movement rights, it is not a genuine alternative and should not be treated as such by the courts. However, there is a real danger here that the courts will identify alternatives without considering their effectiveness in the bargaining process…this could prove highly restrictive of the right to strike.[198]

More broadly, many programmatic fundamental social rights will contain some kind of restriction on economic activity in a cross-border context. For instance, the application of host State rules in relation to minimum pay, holiday entitlement, rules on part-time and fixed work, and bad-weather or temporary lay-off rules, all place restrictions on the cross-border provision of services in the area of posting. While the Posted Workers' Directive provides a minimum level of protection in this regard, we have seen from *Laval*, *Rüffert*, and *Commission v Luxembourg*, that its very existence is also viewed by the Court as a determinant of what is 'necessary' for worker protection, generally precluding more protective measures.[199]

3.3.4. The 'least restrictive alternative' approach: limiting capacity to consider the practicalities of fundamental rights protection.

The definition of necessity, by reference to what is least restrictive of free movement can, at times, limit the legal space for much-needed consideration of the practicalities of designing and implementing programmes for the protection of fundamental social rights. The case of

[197] T. Novitz, 'A Human Rights Analysis of the *Viking* and *Laval* Judgments' (2007–2008) 10 CYELS 541, 560-561
[198] N.195, 143
[199] Case C-341/05 *Laval*, n.21; Case C-346/06 *Rüffert*, n.121; Case C-319/06 *Commission v Luxembourg*, n.122

Libert provides an example of this concern.[200] It will be recalled that, in that case, a Flemish Decree required individuals to demonstrate a 'sufficient connection' to certain target communes before they could purchase property or rent it on a long-term basis. Flanders had argued that the purpose of this measure was to tackle gentrification, a process by which less affluent population groups are excluded from the property market due to the arrival of financially stronger individuals coming from elsewhere. Although not cited by the Flemish government or the CJEU, this is directly relevant to the fundamental right to access to housing, recognised by Article 34 CFR. However, the Court found the Decree to be an unsuitable means of protecting access to housing for low-income individuals, since the measure did not *exclusively* protect such categories of person; other groups were also able to satisfy this criterion. Yet, the Court's use of an 'exclusivity' criterion in *Libert* to ascertain the proportionality of national measures neglects to consider the many competing policy demands that a policymaker faces when deciding on the feasibility of programmes of social protection. For instance, national measures might incidentally assist people to whom they are not directly targeted but this might nevertheless by the best approach when budgetary, administrative, and other logistical burdens are taken into account.

Having found that the 'sufficient connection' test was an inappropriate means of protecting access to housing, the Court proceeded to assess its necessity via its usual question of whether alternatives, less restrictive of free movement, were available. It concluded that there were since, for example, subsidies specifically designed for less affluent people could meet Flanders' purported objective.[201] It is clear that subsidy provision would address well the programmatic aim of enabling access to housing and that such an approach would indeed be less restrictive of free movement. However, it is less clear whether this alternative is feasible in real terms. The *positive* obligations this would impose on Flanders, in the form of monetary assistance, are plainly qualitatively different from the *negative* implementation of this objective, through the 'sufficient connection' test. In short, the latter method is likely to cost less. Indeed, if Flanders cannot afford to offer such a subsidy, it might decide that, in light of its current violation of EU law, it has no option but to scrap attempts to tackle gentrification

[200] Joined Case C-197/11 and 203/11 *Libert,* n.48
[201] It should be noted that it was also suggested that the measure operated to protect the 'Flemish nature' of Flanders against the arrival of French speakers. See the Opinion of AG Mazák, n.149, para.34

altogether. Indeed, the European Parliament has explicitly recognised the impact of the current economic crisis on Member States' abilities to provide such schemes.[202]

Moreover, budgetary issues are broader than the question of whether the Member State will fund, for instance, a subsidy scheme for access to housing, since resources to fund such a programme will have to be diverted from elsewhere. This will potentially impact on other, previously unconnected, systems of social protection. We saw the risk of this, for instance, in the *Watts* case.[203] The requirement that a nationalised health service offers a previously alien system of reimbursement for medical services obtained from other providers, inevitably necessitates the diversion of resources from elsewhere, not to mention that it imposes a new administrative burden.

Indeed, we can ask if any court is the appropriate locus for such policy choices. As Nic Shuibhne and Maci have argued:

> Must States have their *entire* budgets scrutinised so that a court can establish that less restrictive measures for one policy area may be conceived but may nevertheless distort the *balance* of the social security system overall… Even if such a level of scrutiny were remotely feasible in practical terms, it is neither in the functions nor the capacity of courts to execute it…the Court of Justice has opened a precarious avenue of review in the suggestion that it, or any court, can work out the financial "balance" of an entire national budget by reflecting on whether *one* policy choice could have been implemented less restrictively.[204]

The impact of the current approach to necessity on the Court's capacity to contemplate the feasibility of its suggested alternatives can also be viewed outside programmatic systems of social protection. *LIBRO*, it will be recalled from section two, involved an Austrian ban on the sale of imported books below the recommended retail price in the country of origin. This was due to the need to maintain media diversity in a domestic market where the dominance of certain publications made the publishing of important but less economically attractive works difficult. For the Court, this goal could be met by the less restrictive means of permitting foreign publishers to set RRPs exclusively for the Austrian market, which would take into account the specificities of that market. However, the Court made no assessment of the likelihood of economic actors taking steps to limit their commercial success.

[202] European Parliament Resolution of 11 June 2013 on social housing in the European Union (2012/2293(INI)), para.43.
[203] Case C-372/04 *Watts*, n.86
[204] Nic Shuibhne, Maci, n.167, 1003.

This subsection has provided evidence of the existence and effects of an increasing evidential gap between the first and second phases of the Court's two-stage approach, even in the fundamental rights context. The broad definition of a breach of free movement is matched by a generally shallow evidential burden, making it increasingly possible for fundamental rights to constitute *prima facie* breaches of free movement. By contrast, Member States are often required to demonstrate the existence of a 'serious threat' to fundamental rights, evidenced through statistical evidence. Even then, the Court has been known to substitute Member State approaches for its own methods of safeguarding fundamental rights, which might, in fact, offer *lower* standards of protection. Further, the breach/justification dichotomy encourages an assessment of whether domestic fundamental rights standards are necessary by reference to whether there are alternatives available that are less restrictive of free movement. This can reduce the effectiveness of fundamental rights measures in real terms. This is visible, for instance, in the case-law in which focus on labelling as a less restrictive means of protecting consumers has neglected the needs of the 'real' as opposed to 'reasonably circumspect' consumer. Similarly, the focus on finding measures less restrictive of free movement can underestimate idiosyncratic fundamental rights needs, caused, for instance by the peculiarities of language. It can also lead to inevitable contradiction with rights, such as the fundamental right to strike, which are inherently restrictive of free movement when they are exercised in the cross-border context. Finally, Court-proposed 'less restrictive alternatives' do not always adequately consider the practicalities, whether logistical, financial or otherwise, of providing programmatic fundamental social rights or whether alternatives will be adopted by economic actors in practice.

4. Conclusion

This chapter has considered the impact of the expansion in the material and personal scope of the free movement provisions on the protection of fundamental rights. It has demonstrated that the evolution of a breach of free movement, from distinctly applicable measures to a market access test and to positive free movement obligations, has resulted in a significant increase in the volume of interactions between free movement and fundamental rights. The widening of the personal scope of the free movement provisions has also made a direct

contribution to the classification of a larger quantity of fundamental rights endeavours as breaches of free movement.

Given the fundamental role that free movement plays in the achievement of a common market, the central aim of the EEC Treaty, it is unsurprising that the Court opted for an approach, to adjudicating conflict between free movement and protectionist domestic policy, that prioritised the former over the latter. However, in light of the qualitatively different nature of indistinctly applicable measures, and rules restricting market access, we might have expected a change of methodology when free movement's scope was broadened. In fact, although the Court has recognised this in a *substantive* sense, through the introduction of the mandatory requirements, no alteration has been made to the structure of the adjudicative framework. Non-discriminatory Member State rules, and individual activity, are subjected to the same strict proportionality test as is imposed on directly discriminatory measures. Moreover, while the procedural burden at the justification stage had been retained, the broadening of the notion of breach has necessarily expanded the evidentiary options at the breach stage, widening the evidentiary gap between breach and justification. Further, the Court asserts that a *de minimis* test does not operate at the breach stage, and certainly the proportionality of the free movement provisions in relation to its impact upon other areas of law and policy is not systematically assessed. By contrast, activity that is in breach of free movement must increasingly pass a 'seriousness' standard or be supported by statistical evidence. Even then, the Court will often substitute Member State methods of fundamental rights protection for its own. The focus on finding alternative means of safeguarding fundamental rights that are less restrictive of free movement has resulted in an 'impact trio' in this regard. Specifically, the alternatives proposed by the Court can fail to consider the specificities of individual Member States' fundamental rights' needs, the inherently restrictive nature of certain fundamental rights, and the practical considerations that are unavoidably at the heart of fundamental rights policy-making.

Chapter Three

THE DIRECT EFFECT OF THE FREE MOVEMENT PROVISIONS: CEMENTING STRUCTURAL BIAS AND JEOPARDISING FUNDAMENTAL RIGHTS?

1. Introduction

This chapter explores both the direct and indirect contributions that the identification of the direct effect of the free movement provisions has made to the structural prioritisation of free movement over fundamental rights. In section two, the chapter will argue, first, that in order to meet the *Van Gend* criteria for direct effect, it has been necessary to view the free movement provisions as 'unconditional' and 'precise'. This reinforces and legitimises the use of a two-stage breach/justification model that prioritises free movement over conflicting activity. The presentation of the free movement provisions as unconditional, by its nature, invites the treatment of conflicting law, policy and activity as *derogations* from free movement, to be interpreted strictly. Similarly, if the free movement provisions are precise, the legal space for taking a more holistic approach to the definition of the market freedoms, at the breach stage, that would incorporate wider objectives, becomes limited. Since the direct effect of the free movement provisions allows individuals to invoke them directly before their national courts, the doctrine also introduces or strengthens the use of rights language in relation to free movement. This lends further support to an architectural preference for free movement, as it becomes something akin to a fundamental right.[1]

Section three presents the principles of primacy and effective judicial protection as twin channels for realising the structural bias cemented by direct effect. Specifically, where individuals invoke directly effective free movement rights before the national courts, primacy requires those judicial bodies to set aside conflicting domestic measures. The need for effective judicial protection obliges national courts to do so immediately. Viewed in the wider, historical context of building an internal market, the introduction of direct effect, primacy and the principle of effective judicial protection makes logical and significant contributions to economic integration. Nevertheless, by solidifying, and providing outputs for,

[1] Ch.1, s.3.2.2 discusses the architectural preference for Convention rights over competing public interests within the structure of the ECHR.

a structural preference for free movement, these principles increased the latent risk that free movement would be prioritised over fundamental rights should these norms interact. As we saw in chapter two, free movement has, in fact, expanded in a way that brings it into more frequent contract with fundamental rights. In this way, these doctrines have indirectly intensified the subjugation of fundamental rights to the free movement provisions. This also illustrates that the constitutional developments discussed in each chapter cannot be viewed in isolation, or in a linear fashion, but must instead be seen as interconnected, interacting components in the historical and organic formation of architectural imbalance.

Nevertheless, section four will argue that direct effect makes a distinct contribution to this phenomenon in two ways. First, the evolution of the doctrine from vertical to horizontal direct effect also increases the frequency of conflict between free movement and fundamental rights. Second, it additionally alters the nature of the interface, requiring private parties, in certain circumstances, to rely on justifications designed primarily for Member State actors, which can be ill-suited for claims based on the private exercise of fundamental rights.

2. Recognising the direct effect of the free movement provisions: relaxing *Van Gend*, conferring rights, and exacerbating structural bias

This section is concerned with the impact that the conferral of direct effect on the free movement provisions has had on the structural relationship between free movement and fundamental rights. It argues, first, that the interpretation of the free movement provisions as meeting the *Van Gend* criteria of 'unconditionality' and 'precision' reinforces an architectural framework that favours free movement over competing activity. It postulates, second, that since direct effect allows individuals to invoke the free movement provisions directly before the courts, it inevitably solidifies their rights status. This further legitimises an adjudicative model that is tilted towards free movement, when it conflicts with other law and policy.

2.1. The free movement provisions as 'unconditional' and 'precise': the fundamental rights side-effects of loosening the Van Gend *criteria*

When the CJEU declared, in its seminal *Van Gend* judgment, that certain provisions of Union law had direct effect within domestic legal orders, thereby laying down rights that national courts must protect, it nevertheless attached conditions to this occurrence. Specifically, measures had to be clear and unconditional, imposing negative rather than positive obligations, and requiring no legislative intervention on the part of the States.[2] These criteria, and the relative peculiarity of the relevant provision in the case itself in meeting them,[3] meant that *Van Gend* did not cause quite the storm that we might expect with hindsight.[4]

However, the requirements of 'unconditionality' and 'precision' have subsequently been quite broadly interpreted, allowing a greater range of Union law to enjoy direct effect. This includes the Treaty's free movement provisions on goods, services/establishment, persons, and capital.[5] This has certainly facilitated the market freedoms in their foundational task of creating an internal market as they can be directly enforced by national courts, while their presentation as unconditional and precise underscores their normative significance. Nonetheless, a side-effect of this historical development is the exacerbation of structural weakness in terms of fundamental rights protection. It is this phenomenon with which this subsection is concerned.[6]

2.1.1. The 'unconditional' criterion redefined

In light of the fact that Articles 34, 45, 49, 56 and 63 TFEU, providing for the free movement of goods, workers, establishment, services, and capital respectively, are followed by

[2] Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] EU:C:1963:1, p.13
[3] Now Art.30 TFEU
[4] See B. De Witte, 'Direct Effect and the Nature of the Legal Order', in G. de Búrca, P. Craig (eds), *The Evolution of EU Law*, (2nd edition, OUP, 2011), 323, 329; D. Chalmers et al, *European Union Law: Cases and Materials*), (2nd edition, Cambridge, 2010) 269
[5] Case 13/68 *Salgoil* [1968] EU:C:1968:54 (goods); Case 41/74 *van Duyn v Home Office* [1974] EU:C:1974:133 (workers); Case 2/74 *Reyners v Belgium* [1974] EU:C:1974:68 (establishment); Case 48/75 *Royer* [1976] EU:C:1976:57 (workers, establishment, and services); Joined Case C-163/94, C-165/94 and C-250/94 *Sanz de Lera a.o.* [1995] EU:C:1995:451 (capital).
[6] Although related to state liability, and not direct effect, the *Van Gend* criterion that provisions of Union law impose 'negative' as opposed to 'positive' obligations has arguably been partially circumvented by the introduction of State liability for failure to implement Union law in Case C-6/90 *Francovich and Bonifaci v Italy* [1991] EU:C:1991:428. In Case C-112/00 *Schmidberger* [2003] EU:C:2003:333 this left a Member State open to an action for State liability for failing to take positive steps to secure the free movement of goods against restrictions imposed by the exercise of the fundamental rights to freedom of expression and association. However, this development relates more closely to the expansion in the scope of the free movement provisions which was already discussed in ch.2, s.2.1.4.

provisions permitting their limitation, they might have been interpreted as failing to meet the *Van Gend* requirement of 'unconditionality' for the identification of direct effect. For instance Article 52(1) TFEU, relating to establishment and services,[7] stipulates that:

> The provisions of this Chapter…shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security, or public health.

Thus, the prohibition of obstacles to the freedoms of establishment and services could be viewed as *conditional* on there not being reasons of public policy, public security, or public health, requiring such restrictions. Similar arguments can be made in relation to Articles 34 and 36, Articles 45 and 45(3); and Articles 63 and 65(1)(b) TFEU.

And yet, each market freedom has been recognised as having some degree of direct effect.[8] Although this seemingly represents a relaxation of the *Van Gend* criteria, the free movement provisions have, nevertheless, been interpreted as far as possible in line with the 'unconditional' requirement. In *Salgoil,* in which Article 34 TFEU was declared directly effective, the Court did not interpret Article 36 as imposing conditions on the operation of Article 34, but rather as dealing 'with *exceptional* cases which are clearly defined and which *do not lend themselves to wide interpretation* [emphasis added].'[9] Similarly, in *Royer,*[10] the CJEU stated that Articles 45(3) and 52(1) were not to be viewed as a condition precedent to the free movement of workers, establishment or services, but as merely providing the possibility, in individual cases and where there is sufficient justification, of imposing restrictions upon those freedoms.[11] As Craig remarks, in relation to *Salgoil*, the Court has made clear that it will read the free movement chapters as a whole, with the consequence that if the requisite conditions for direct effect are met by their main articles, this will not be lightly jeopardised by the existence of provisions such as Article 36. For Craig, the decision in *Salgoil* demonstrated:

> …the determination of the [CJEU] that the peremptory force of direct effect was not to be weakened by enabling States to draw on Treaty articles which contained discretion to, for example, prohibit import of goods

[7] Application to services via Art.62 TFEU
[8] N.5
[9] Case 13/68 *Salgoil*, n.5, p.463
[10] Case 48/75 *Royer*, n.5, para.29
[11] For a similar approach to capital, see Case C-387/11 *Commission v Belgium* [2012] EU:C:2012:670, para.43

on grounds of public policy or public health… [These] would only be deemed to operate in carefully defined circumstances, the ambit of which would be controlled by [the Court] if and when necessary.[12]

The interpretation of the free movement provisions as sufficiently unconditional to have direct effect is clearly an advantage from the perspective of economic integration. Not only is cross-border movement facilitated by private enforcement in domestic courts, but the status of the free movement provisions as 'unconditional' introduces a presumption that they should be prioritised in any conflict with opposing law or policy. Thus, Articles 36, 45(3), 52(1) and 65(1) are not conceptualised as limitations on, or conditions for, the exercise of free movement, but as 'derogations', operating in 'exceptional circumstances'.[13] These 'do not lend themselves to wide interpretation'[14] and will be defined by the Court. Crucially, this interpretation of the Treaty freedoms invites the use of an adjudicative model for addressing tensions between free movement and competing activity that structurally favours the former. Accordingly, the two-stage breach/justification model, which requires conflicting law and policy to justify itself against a *prima facie* unlawful restriction on free movement, is legitimised and reinforced by free movement's direct effect. As part of this, a strict proportionality test, which assesses whether obstacles imposed on the market freedoms are suitable and necessary, by reference to what would be least restrictive of free movement, finds renewed support.

However, both *Salgoil* and *Royer* preceded the Court's decision in *Cassis de Dijon*.[15] As chapter two demonstrated, this judgment brought the free movement provisions into contact with a wider range of legitimate societal aims with oblique, rather than direct, consequences for the operation of the internal market. Consequently, *Cassis* also introduced the non-exhaustive mandatory requirements, which could be said to call into question the existence of restrictions on free movement as an 'exceptional circumstance'. Critically, as chapter two demonstrated, free movement has, over time, come into increased contact with fundamental rights. Although accepted as permissible justifications for restrictions of free movement,[16] these do not feature in the derogating provisions. Thus, contrary to the Court's reasoning in *Salgoil*, it seems that, for instance, Article 34 TFEU cannot necessarily be viewed as

[12] P. Craig, 'Once Upon a Time in the West: Direct Effect and the Federalisation of EEC Law', (1992) 12(4) OJLS 453, 463
[13] Case13/68, *Salgoil*, n.5
[14] Ibid
[15] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] EU:C:1979:42
[16] Case 112/00 *Schmidberger*, n.6; Case C-36/02 *Omega* [2004] EU:C:2004:614

'unconditional' by virtue of the fact that derogations from them are 'clearly defined'. Yet, as free movement has expanded into new areas of activity, we see a hangover of its presentation as 'unconditional' and of competing law and policy as 'derogations' to be 'strictly defined'.[17] This includes the protection of fundamental rights, which are slotted into the justification stage of a two-stage model, legitimised by the notion of unconditionality that the conferral of direct effect creates.

For instance, in *Schmidberger*, although the Court accepts the exercise of the fundamental rights to freedom of expression and association as permissible restrictions of the free movement of goods, the indirect influence of free movement's historical presentation as 'unconditional' is implicit in the CJEU's declaration that:

> [T]he protection of [fundamental] rights is a legitimate interest which, *in principle, justifies* a restriction of the *obligations* imposed by Community law, *even* under a fundamental freedom guaranteed by the Treaty [emphasis added]'.[18]

Respect for fundamental rights is not viewed as a condition for the exercise of free movement. After all, Article 34 TFEU is unconditional. Instead, fundamental rights constitute a possible derogation from that provision, so long as they meet the requirements of proportionality.[19] The notion that as *derogations* from free movement, justifications 'do not lend themselves to wide interpretation' was explicitly transplanted into the fundamental rights context in *Omega*. Here, the Court, having decided that the fundamental right to human dignity fell within the public policy derogation, stated that:

> [T]he concept of 'public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions.[20]

This coheres with Craig's interpretation of *Salgoil* that derogations operate in carefully defined circumstances, set by the Court itself.[21] Although the CJEU elected to offer the

[17] Case C-208/09 *Sayn-Wittgenstein* [2010] EU:C:2010:806, para.86; Case C-503/03 *Commission v Spain* [2006] EU:C:2006:74, para.45
[18] Case C-112/00 *Schmidberger*, n.6, para.74
[19] Para.78 and 82-94
[20] Case C-36/02 *Omega*, n.16, para.30; see also Case C-319/06 *Commission v Luxembourg* [2008] EU:C:2008:350, para.30
[21] Craig, n.12

Member State a wide margin of discretion in *Omega* itself, the unconditionality of free movement supports the CJEU's claim that this decision lies within its jurisdiction. More broadly, the presentation of fundamental rights as 'justifications in principle' for *derogating* from the 'fundamental principle' of free movement inherently supports the employment of a two-stage breach/justification methodology for adjudicating tensions between free movement and fundamental rights. Similarly, the application of a proportionality test, not faced by free movement, to the exercise of fundamental rights is intrinsic to their status as justifications 'in principle' that must nevertheless be interpreted 'strictly'. This is reflected in the focus of the proportionality analysis on whether measures less restrictive of free movement are available. Chapter two demonstrated that the maintenance of the breach/justification framework in relation to non-discriminatory restrictions of free movement was encouraged by the Court's language of 'mandatory' 'overriding' or 'imperative' requirements. The analysis now suggests that this language might, itself, reflect a historical hangover from the presentation of the free movement provisions as 'unconditional', to satisfy the *Van Gend* criteria, and the consequent need to interpret derogations strictly. Accordingly, this provides a richer, multi-faceted explanation for the findings, in chapter two, that fundamental rights face significant justificatory hurdles not imposed on free movement.

For instance, in *Viking*, exercise of the fundamental right to strike for the purposes of worker protection could only be justified if employees' jobs were 'jeopardised or under serious threat'.[22] Even then, it was necessary to consider whether other means less restrictive of free movement were exhausted before strike action was initiated. In other words, a *strict* approach to justifying restrictions on free movement required the trade unions not only to pursue a tightly defined aim when exercising their right to strike, but also to justify the degree of action taken.[23] In *Laval* and *Rüffert*, the core nucleus of the Posted Workers' Directive,[24] containing the terms and conditions that Member States (or trade unions via collective agreements) must impose on foreign undertakings posting workers to their territory, was found to impose a ceiling of worker protection rather than a floor.[25] Thus, the core nucleus represented the extent to which industrial action, in situations of posting, would be 'necessary' for the protection of workers. Significantly, in the latter case, the Court explicitly stated that this

[22] Case C-438/05 *Viking* [2007] EU:C:2007:772 para.81
[23] See also Case C-244/06 *Dynamic Medien* [2008] EU:C:2008:85, para.42; Case C-368/95 *Familiapress* [1997] EU:C:1997:325, para.19
[24] Art.3(1)(a)-(g) Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provisions of services (OJ 1997 L18/1)
[25] Case C-341/05 *Laval* [2007] EU:C:2007:809; Case C-346/06 *Rüffert* [2008] EU:C:2008:189

interpretation was confirmed by the fact that the PWD sought to bring about the freedom to provide services as a 'fundamental principle guaranteed by the Treaty'.[26] In other words, the PWD is viewed as a facilitating instrument of, but also, simultaneously, a derogation from, the fundamental and unconditional status of Article 56. This necessitates a strict approach to its interpretation. Although the Court acknowledged, in *Commission v Luxembourg*, that Article 3(10) PWD allowed for additional terms and conditions to be applied for reasons of public policy, the CJEU reiterated that as a *derogation* from the fundamental principle of freedom to provide services, that provision must be interpreted 'strictly'.[27] It will be recalled, from chapter two, that Luxembourg was required to provide evidence of a genuine and sufficiently serious threat to a fundamental interest of society'.[28]

This judicial control over, and scrutiny of, Member State derogations from free movement even in the fundamental rights situation of worker protection[29] and the applicability of settled collective agreements,[30] arguably has further foundations in the criteria for direct effect. In *Van Duyn*, although the CJEU accepted that Article 45(3) TFEU placed limitations on the free movement of workers, this did not preclude Article 45 TFEU from meeting the *Van Gend* criteria.[31] Since those limitations were, themselves, 'subject to judicial control' Article 45 was capable of conferring rights upon individuals, which the national courts must protect.[32] In this way, 'judicial control' is presented as a means of reducing the effect of potential derogations on the unconditionality of free movement. The courts are implicitly charged with constraining the operation of derogations against the prioritised market freedoms. Logical in the context of tackling potentially protectionist, directly discriminatory Member State law and policy, this approach nevertheless becomes potentially detrimental, when carried over into the adjudication of conflict between free movement and fundamental rights. It tacitly tasks courts with controlling or restricting fundamental rights that place limits on free movement. Indeed, *Commission v Luxembourg* arguably provides one example of the hangover of 'judicial control' in this context. More generally, this judicial control manifests in the subjection of fundamental rights protection to proportionality assessment at the justification phase of the

[26] Para.36
[27] Case C-319/06 *Commission v Luxembourg*, n.20, para.50
[28] Ibid.
[29] Art.31 CFR
[30] Art.28 CFR
[31] Case 41/74 *van Duyn*, n.5. See, in the context of capital, Case C-163/94 *Sanz de Lera*, n.5, para.43
[32] Para.7

two-stage model. Thus, for instance, in the context of the fundamental right to health,[33] we can see the legacy of 'judicial control' in the Court's rigorous assessment, in *Watts*, of whether the operation of the UK's National Health Service – which, as a nationalised system, did not have a reimbursement mechanism for medical treatment received abroad - imposed justifiable restrictions on Article 56 TFEU.[34] Similarly, it is visible in the Court's requirement in *Commission v Austria*, that that Member State provide statistical evidence of the effects of free movement on what can be viewed as Austria's programmatic implementation of the fundamental right to education.[35] More broadly, the Court's decision to apply its usual one-sided proportionality assessment in fundamental rights cases;[36] to interpret fundamental rights strictly;[37] to examine whether methods of protecting fundamental rights that are less restrictive of free movement are available;[38] and, more recently, to assess whether fundamental rights policy exclusively protects targeted beneficiaries,[39] can all be said to reflect an assumption of 'judicial control'.

2.1.2. The direct effect of programmatic provisions

Direct effect was bestowed upon Article 30 TFEU in *Van Gend inter alia* because it required no further legislative intervention by the Member States. Article 52 EEC stipulated that '…restrictions on the freedom of establishment…shall be abolished by *progressive stages in the course of the transitional period* [emphasis added]'. Article 59 EEC approached the free provision of services in a similar manner. Accordingly, it was argued in *Reyners* that Article 49 TFEU did not enjoy direct effect because it was '...only the expression of a simple principle, the implementation of which is necessarily subject to a set of complementary provisions both Community and national, provided for by Articles 54 and 57 [EEC]'.[40] The Court disagreed. It held that Article 49 imposed an obligation to achieve a precise result – the

[33] Art.35 CFR
[34] Case C-372/04 *Watts* [2006] EU:C:2006:325, para.116: a requirement of prior authorisation must 'be based on objective, non-discriminatory criteria…known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion…be based on a procedural system which is easily accessible and capable of ensuring that a request for authorisation will be dealt with objectively and impartially within a reasonable time and refusals to grant authorisation must also be capable of being challenged in judicial…proceedings'
[35] Case C-147/03 *Commission v Austria* [2005] EU:C:2005:427, para.63
[36] Case C-36/02 *Omega*, n.16; also Case C-244/06 *Dynamic Medien*, n.23; Case C-368/95 *Familiapress*, n.23
[37] Case C-36/02 *Omega*, n.16
[38] Case C-438/05 *Viking*, n.22; Joined Cases C-197/11 and C-203/11 *Libert* [2013] EU:C:2013:288. For full discussion of this approach from a fundamental rights perspective, see ch.2, s.3.3.
[39] Joined Cases C-197/11 and C-203/11 *Libert*, ibid, para.55
[40] Case 2/74 *Reyners*, n.5, para.5

freedom of establishment – which would be facilitated by, but was not dependent on, secondary Union legislation. After the transitional period, secondary legislation was superfluous since the freedom of establishment was sanctioned by the Treaty itself, with direct effect.[41] In *Royer*, which also concerned the freedom of establishment, as well as the free movement of workers and services, the Court referred to secondary legislation as merely providing 'closer articulation' of the directly effective rights bestowed upon individuals by Articles 49, 45, and 56 TFEU.[42]

Despite the Court's assertion that comprehension of the content of the market freedoms is assisted by, but not reliant on, secondary legislation, it is clear that the 'sufficiently precise' criterion has been relaxed here.[43] As Craig argues, Articles 49 and 56 seem to 'contemplate expressly further action by the legislative organs of the [Union] and by the Member States in order to effectuate the social and economic aims of this part of the Treaty.' The provisions acknowledge that 'the very regime of freedom of establishment involves a complex array of legislative norms in order that these aims can be achieved.'[44] When placed in its historical context, the *Reyners* judgment can, however, be understood as a response to a period of inertia from the Union's political institutions in exercising their 'decisional supranationalism'.[45] The Member States had not agreed upon legislative programmes for achieving an internal market within the time set by the Treaty. Craig postulates that the direct effect status of Article 49 operated as a warning to the Member States that 'normative supranationalism',[46] in the guise of direct effect, could act as a surrogate for the ordinary legislative process, in order to secure the internal market, should the States continue to be tardy to preserve their own interests.[47]

Nevertheless, this historical explanation does not change the fact that the provisions on the freedoms of establishment and services, in particular, foresaw the creation of a legislative

[41] Paras.26 and 30. On goods see Case 13/68 *Salgoil*, n.5, p.460, discussing Art.31 EEC.
[42] Case 48/75 *Royer*, n.5, para.23; see also Case 33/74 *van Binsbergen* [1974] EU:C:1974:131, para.26
[43] See also Craig, n.12, 464
[44] Ibid
[45] See J. Weiler, 'The Dual Character of Supranationalism', (1981) 1 YBEL 267, and 'The Transformation of Europe', (1991) Yale LJ 2403, 2412-2431
[46] This term was coined by Weiler (ibid) and concerns the relationships and hierarchies operating between Union law and policy on the one hand and the competing domestic law and policy of the Member States on the other.
[47] N.12, 466-467; c.f. Case C-378/97 *Wijsenbeek* [1999] EU:C:1999:439 in which the CJEU held that Article 7a EC could not be interpreted as requiring Member States to abolish passport checks at the border at the end of the transitional period since this required the harmonisation of laws governing external borders, including rules on visa and asylum, which has not yet been achieved, para.40-45.

framework for managing the relationships between the important, and overlapping, areas of social and economic policy involved in securing these market freedoms. Accordingly, the direct effect status of Articles 49 and 56 TFEU changes the dynamic between the freedoms of establishment and services and other legitimate goals. Whereas the very definition of a breach of Articles 49 and 56 might originally have incorporated these other aims, 'the Court, through direct effect…makes clear that the other provisions of the chapter [which acknowledged some of these other goals][48] are, in relative terms, of secondary importance'.[49] This reinforces the structural favouring of free movement when it conflicts with other rules. Since the free movement provisions are precisely defined, competing law and policy cannot constitute definitional components of the market freedoms. Instead, they are examined as derogations and pushed to the justification phase of the two-stage process. As the free movement provisions are also 'unconditional', we have seen that these derogations must be strictly defined.

The cases of *Viking* and *Laval*[50] offer clear examples of the complex interactions between different areas of law and policy that are an inevitable consequence of achieving the freedoms of establishment and services. Significantly, they also illustrate the consequent impact on fundamental rights when these inevitable considerations are shunted to the justification stage by the presentation of the free movement provisions as 'precise'. Thus, in *Viking*, the freedom of Viking Line to establish/register its ship in Estonia led to the question of whether it should be able to apply labour rules, arising from Estonian collective agreements, to a ship originally sailing under the Finnish flag. This has direct fundamental rights consequences due to the general lowering of worker terms and conditions that this would engender.[51] Further, the presentation of proposed strike action to prevent the re-flagging, as a restriction of Article 49 TFEU, also triggers the fundamental right to collective action, recognised by Article 28 CFR. Despite these questions, and the acknowledgement that regulation of the right to strike remained within the legislative competence of the Member States, the Court noted that freedom of establishment was one of the 'fundamental principles' of Union law that had been

[48] E.g. Art.54 EEC, which required the Member States to design a 'general programme' for the abolition of restrictions on establishment, and Art.57 EEC, which obliged the Member States to issue directives on mutual recognition of professional qualifications'.
[49] Craig, n.12, 467
[50] Case C-438/05 *Viking*, n.22; Case C-341/05 *Laval*, n.25
[51] According to Art.34 CFR 'every worker has the right to working conditions that respect his or her health, safety and dignity'.

'directly applicable since the end of the transitional period'.[52] Since the aim of Article 49 TFEU is clear: attaining freedom of establishment, it is irrelevant that the nuances of its achievement - such as how to match-up equivalent qualifications[53] or cater for idiosyncrasies in healthcare models,[54] or, in this case, address disparities in terms and conditions of employment - have not always been addressed. Accordingly, in *Viking*, a *prima facie* breach of Article 49 is instead established simply by reference to the fact the strike action, in order to secure the maintenance of Finnish employment conditions after re-flagging, would make exercise of the freedom of establishment less attractive to Viking Line. The 'public interest' in worker protection can only be considered as part of the trade unions' defence in exercising their right to strike, as opposed to being incorporated into an holistic appraisal of the programmatic complexities of cross-border establishment.[55] Consequently, despite the CJEU acknowledging that the Union has 'not only an economic but also a social purpose' against which the Treaty freedoms must be balanced,[56] a true balancing of the competing goals does not occur. While exercise of the 'precisely' defined freedom of establishment must merely be rendered 'less attractive', the objective of worker protection must overcome the proportionality questions of 'suitability' and 'necessity', assessed by reference to whether there are means of protecting employees that are less restrictive of free movement'.[57]

Similarly, in *Laval*, the CJEU explicitly accepted that the questions of labour law, which are triggered by the posting of workers from one Member State to another, had not been answered by harmonisation at EU-level. It stated that, 'since the purpose of [the PWD] is not to harmonise systems for establishing the terms and conditions of employment in the Member States, the latter are free to choose a system at the national level, which is not expressly mentioned among those provided for in that directive'.[58] However, critically, the Court added that this was 'provided that it does not hinder the provision of services between the Member States'.[59] Thus, the social objectives that inevitably interact with the cross-border provision of services did not form part of the definitional framework of Article 56 TFEU. Instead, they were to be considered as part of the justification for restrictions on the precise, but rather

[52] Para.68
[53] Case C-222/86 *UNECTEF v Heylens* [1987] EU:C:1987:442; Case C-340/89 *Vlassopoulou* [1991] EU:C:1991:193
[54] Case C-372/04 *Watts*, n.34
[55] See para.75
[56] Paras.78-79
[57] Para.87
[58] Para.68
[59] Ibid

simplified, goal of abolishing restrictions to intra-European service provision, which had allowed Article 56 to enjoy direct effect at the end of the transitional period.[60] Consequently, despite the Court once again acknowledging the Union's social, as well as economic, purpose,[61] an obstacle to the free movement of services was found by reference to the fact that the imposition of terms and conditions of employment, going above and beyond the content of the PWD, made it 'less attractive' to provide services across EU borders. By contrast, the exercise of trade union collective action and the aim of worker protection were assessed in accordance with what was least restrictive of the precise goal of intra-EU service provision. The PWD was found generally to indicate the maximum level of worker protection necessary in this regard and therefore also to specify the extent to which collective action would be justified. On the issue of minimum pay, the CJEU held that the Swedish mechanism for determining minimum rates – which consisted of case-by-case negotiation at the worksite according to the qualifications and experience of the individual worker - was in breach of Article 56 TFEU because it formed 'part of a national context characterised by a lack of provisions, of any kind, that are sufficiently precise and accessible that they do render it impossible or excessively difficult…for such an undertaking to determine the obligations with which it is required to comply…'.[62] On the one hand, this is probably true and, therefore, Article 56 does reflect, to some extent, the precise goal of removing barriers to the free provision of services, while its direct effect contributes to tackling this obstacle. On the other hand, this simplified approach to defining the content of Article 56 deals only superficially with the question of pay, which is unavoidably triggered by the temporary posting of workers across borders. The Court's reasoning does not make allowance for the lack of harmonisation in this area at Union-level or, indeed, for the fact that the Treaty leaves the issue of pay explicitly to the Member States.[63] The Court's focus is on the undermining of the Member State's precise obligation not to restrict the freedom of services. A corresponding approach can be seen in the *Rüffert* and *Commission v Luxembourg* judgments, whereby national rules, determining minimum rates of pay according to local collective agreements and attaching a wage index to salaries respectively, were found to impose restrictions on Article 56 TFEU.[64]

[60] Para.97
[61] Para.105
[62] Para.110
[63] Art.153(5) TFEU
[64] Case C-346/06 *Rüffert*, n.25; Case C-319/06 *Commission v Luxembourg*, n.20

Even if the Court were to take these issues into account in its characterisation of Article 56, the consequence of its recognition of the direct effect on the market freedoms is that the construction of that provision's definitional framework is transferred from the legislature to the judiciary. The visual metaphor used by Craig in relation to Article 49 TFEU is equally applicable here:

> [I]magine that the totality of the relevant rules on freedom of establishment is represented by a chess board. Article [49], the core principle of the area, is the boundary of the board, while the particular squares thereof represent the detailed rules which should be enacted by the [political institutions]. [Where legislation is missing, the principle of direct effect means that] the ECJ will provide an answer…and will in that sense fill the appropriate square… It is, in reality, assuming a role which the Treaty primarily accords to other organs.[65]

As well as reigniting the existing issue of the appropriateness of judicial law-making, direct effect consequently introduces practical questions about the Court's ability to 'fill in the blanks' when its examination of fundamental rights is structurally shaped by the goal of free movement, and is channelled through a breach/justification framework. Thus in *Libert*, the Court presented subsidies for purchase as a more proportionate method of securing access to housing for low-income individuals/families on the basis that this was less restrictive of free movement than Member State rules requiring a 'sufficient connection' between a potential transferee and certain geographical areas.[66] However, the feasibility of this alternative, devised by reference to the needs of abolishing restrictions to free movement, can be questioned. For instance, the European Parliament has subsequently remarked upon the decline in such subsidies for securing the fundamental right to housing[67] as a result of the economic crisis.[68] It is the direct effect of free movement that permits this Europeanisation through the judicial back-door of areas of fundamental social rights that the Treaty intentionally leaves to the Member States. Since the *Van Gend* requirement of precision has simplified free movement goals, social policy is reconceptualised as a *breach* of free movement and the Court suggests fundamentally different approaches, which might not be practicable on the ground. In other words, the presentation of, for instance, Articles 49 and 56 TFEU, as precise by virtue of the goal of abolishing restrictions on establishment and services, presents these freedoms as areas of Union policy that are apparently discrete from

[65] Craig, n.12, 465-466
[66] Joined Cases C-197/11 and C-203/11 *Libert*, n.38, para.56
[67] Recognised by Art.34 CFR
[68] European Parliament Resolution of 11 June 2013 on social housing in the European Union (2012/2293(INI)), para.43

social concerns, when, in reality, they frequently, and unavoidably, overlap. Interestingly, this can be contrasted with the introduction of fundamental rights as a theme cutting across the economic, social and environmental impact assessments that form part of the formation of Union legislation. The purpose of an impact assessment, from a fundamental rights perspective, is 'to provide the Commission, right from the start of the drafting process, with a complete picture of the various impacts which the process can have on individuals and groups whose rights may be involved, depending on the options envisaged'.[69] The one-sided proportionality assessment of the impact of the exercise of fundamental rights on the market freedoms, at the justification phase of the Court's two-stage methodology, does not incorporate such an approach within the judicial sphere.

Where secondary Union legislation does exist to cater for some of the social and/or fundamental rights issues automatically triggered by cross-border movement, the direct effect of the Treaty provisions on free movement arguably reduces their potential in this regard. This is because secondary legislation can no longer be viewed as completing, or adding nuance to, programmatic free movement provisions. It must instead be interpreted according to the goals of precise and unconditional primary law. For instance, the Posted Workers' Directive is concerned with coordinating the terms and conditions of employment in the context of the cross-border posting of workers.[70] Accordingly, it could be viewed as an essential cog within the programme of the free provision of services itself. However, since Article 56 TFEU has already been found to have a specific meaning, in *Laval* the scope of the PWD was determined by reference to the precise obligation to abolish restrictions to the free provision of services. Consequently, as a concrete expression of the goals of Article 56, the PWD could provide a list of the terms and conditions host Member States are able to impose on service providers coming from other Member States, but this had to be viewed as a maximum, rather than minimum, level of protection. This clearly has the potential to lower standards regarding the fundamental social rights of workers. Further, it rendered trade unions, who had exercised their fundamental right to strike in order to secure terms and conditions for posted workers above and beyond those contained in the PWD, in breach of Union law.[71]

[69] Commission Communication on Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals COM(2005) 172, 3-4
[70] Directive 96/71, n.24
[71] Case C-341/05 *Laval*, n.25, para.108. Interestingly, this was not the Court's approach in the recent citizenship Case C-333/13 *Dano v Jobcentre Leipzig* [2014] EU:C:2014:2358. Here, the CJEU held that Directive 2004/38 of the European Parliament and of the Council on the rights of citizens of the Union and their family members to

The above analysis has highlighted the indirect contributions to the structural prioritisation of free movement over fundamental rights that have been made by the interpretation of the free movement provisions as sufficiently 'unconditional' and 'precise' to enjoy direct effect. Specifically, the unconditional nature of the market freedoms presents Articles 36, 45(3), 52(1) and 65(1) TFEU as 'derogations from' rather than 'limitations on' the free movement provisions, to be strictly defined. Moreover, the finding that the free movement provisions are unconditional, since their potential derogations are 'subject to judicial control', tasks the courts with taking a strict approach to interpreting opposing law and policy. These historical developments have been maintained in the case-law on fundamental rights, inherently inviting a breach/justification framework that treats fundamental rights as *prima facie* wrongful. Since (for instance) Articles 49 and 56 TFEU are viewed as providing precise definitions of the freedoms of establishment and services, overlapping areas of law and policy, including fundamental rights issues such as worker protection and the right to strike, cannot be examined as *part of* a complex programme of forming an internal market and accordingly assessed *alongside* the abolition of restrictions to cross-border movement. Instead, competing goals must be examined as a derogation from the precisely defined objective of prohibiting obstacles to intra-EU movement. This inevitably reinforces, the two-stage breach/justification process that, when employed to address tensions between free movement and fundamental rights, structurally favours the former over the latter. In some cases, even where secondary legislation has been introduced to manage some of the social questions automatically triggered by cross-border service provision, the precise obligations that now arise from directly effective primary law inhibit the protective potential of secondary Union law, with repercussions for the exercise of fundamental rights. More broadly and beyond the scope of this work, this raises significant questions, regardless of the accepted existence of periods of political stagnation, about whether direct effect has alienated the legislature from the formation of the internal market and distorted the balance, originally envisaged within the Treaty, between competing but interlocking policy goals.

The next subsection argues that direct effect has individualised and fundamentalised the market freedoms through its introduction or reinforcement of rights-language in relation to their exercise. The consequent fusion of free movement as a fundamental principle of the

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move and reside freely within the territory of the Member States (OJ 2004 L158/77) was presented as a 'specific expression' of Art.18 TFEU and thereby as completing its requirements and conditions, para.61

common market with its status as an individual right introduces fundamental rights connotations to cross-border movement. In this way, direct effect has indirectly strengthened a structural bias in favour of free movement. The subsection will posit, second, that by making individuals private enforcers of Union law, direct effect has altered the reach of the market freedoms. Specifically individuals are able to demonstrate new ways, by reference to their own experiences, in which activity, which might appear *prima facie* to be unrelated to the internal market, imposes obstacles to the exercise of free movement. Structural bias is also exacerbated since rights, which do not enjoy direct effect, cannot by enforced by individuals on an equal footing with free movement. Finally, the subsection will postulate that the conferral of direct effect contributes to the reconceptualisation of free movement from an instrument for completing the internal market to an independent goal in and of itself. At times, this can result in the prioritisation of free movement over *other* internal market considerations that might have complemented fundamental rights.

2.2. The individualisation of free movement following the conferral of direct effect: the historically understandable yet potentially damaging language of the Court

In its discussion of the doctrine of direct effect, the Court in *Van Gend* stated that, since the EU constitutes a new legal order comprising not only the Member States but also *their nationals*, Union law 'not only imposes obligations on individuals but is also intended to *confer upon them rights which become part of their legal heritage* [emphasis added]'.[72] Thus, although it remains open to question whether direct effect confers rights status on provisions or if it is their rights status that triggers direct effect, *Van Gend* clearly associates directly effective provisions with the existence of individual rights.[73] Accordingly, since, in the context of free movement, the relevant provisions *have* been found to encompass individual rights in the course of decisions granting them direct effect, the purpose of this section is not to enter into these debates.[74] The focus is, instead, on the effects of the use of rights-language,

[72] Case 26/62 *Van Gend en Loos*, n.2, p.12
[73] See T. Eilmansberger, 'The Relationship Between Rights and Remedies in EC law: In Search of the Missing Link', (2004) 41 CMLRev 1199, 1203
[74] See De Witte, n.4, 330-332; T. Downes, C. Hilson, 'Making Sense of Rights; Community Rights in EC Law', (1999) 24(2) ELRev, 121, 131; S. Prechal, 'Does Direct Effect Still Matter?' (2000) 37 CMLRev 1047. It seems increasingly uncertain, in light of more recent case-law that provisions of EU law have to encompass individual rights in order to enjoy direct effect status: Case C-194/94 *CIA Security International v Signalson and Securitel* [1996] EU:C:1996:172; Case C-72/95 *Kraaijeveld a.o*. [1996] EU:C:1996:404

which the doctrine either introduces or reinforces to the exercise of free movement, on its relationship with fundamental rights.

Analysis of the Court's reasoning in *Van Gend*, quoted above, has led to the argument that the line between direct effect status and individual rights, in that case, was so blurred as to make the concepts 'synonymous'.[75] This connection is also evident in the Court's reasoning when declaring the direct effect status of the market freedoms. While the Rome Treaty adopted rights-language in relation to the free movement of workers and establishment,[76] it only granted a 'freedom' to provide services and created no 'right' to import or export goods, or effect capital transfers.[77] However, when the Court confirmed, in *Salgoil*, that Article 31 EEC,[78] relating to the free movement of goods, was directly effective, it identified a clear link between this status and the existence of individual rights:

> The prohibition in Article 31 [EEC] of its very nature lends itself perfectly to producing direct effects... *Thus* Article 31 *creates rights* which national courts must protect [emphasis added].[79]

These historically blurred lines between direct effect and the creation of individual rights are also particularly apparent in *Royer*, on the freedoms of workers, establishment, and services, in which the Court stated that the relevant Treaty provisions 'have the effect of *conferring rights directly* on all *persons* [emphasis added]' falling within their ambit.[80] In *Sanz de Lera*, the CJEU used the phrase '*conferring rights on individuals* which they may rely on before the courts and which the national courts must uphold [emphasis added]' to declare the free movement of capital directly effective.[81] The inextricability of direct effect from rights, in this context, has led Eilmansberger to argue that it is direct effect that gives Articles 34 and 49 TFEU the capacity to create individual rights.[82] For our purposes, it is therefore clear that the

[75] Downes, Hilson, ibid, 124. They proceed to argue that the case-law no longer treats direct effect and rights as synonymous. However, this does not detract from the potential influence of the historical connection between direct effect and individual rights, which is the focus of our own discussion.
[76] Arts.48(3) and 52 EEC
[77] Arts.59, 30, 34 and 67 EEC, respectively; N. Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in C. Barnard, O. Odudu (eds), *The Outer Limits of European Union Law*, (Hart, 2009), 167, 184-185
[78] Art.37(2) TFEU, amended following the end of the transitional period.
[79] Case 13/68 *Salgoil*, n.5, p.460; see also Case 222/82 *Apple and Pear Development Council* [1983] EU:C:1983:370, para.37
[80] Case 48/75 *Royer* n.5, para.23; see also Case 41/74 *van Duyn*, n.5, para.7 (workers); Case 36/74 *Walrave and Koch* [1974] EU:C:1974:140, para.34 (services); Case C-438/05 *Viking*, n.22, paras.58 and 66 (establishment).
[81] Case C-163/94 *Sanz de Lera*, n.5, para.43
[82] Eilmansberger, n.73, 1225

emergence of the doctrine has explicitly associated the market freedoms with the exercise of individual rights and, depending on the freedom in question, either introduced or reinforced rights-language in relation to them.

Moreover, there is evidence of linguistic conflation of the market freedoms as individual rights with their status as 'fundamental principles' of Union law, arguably resulting in their implicit presentation as fundamental rights. For instance, in its *Viking* judgment, the Court uses the phrases 'right to establishment' and 'fundamental freedom' interchangeably, as part of its discussion of the directly effective nature of Article 49 TFEU.[83] Similarly, the CJEU has combined these terms with the principle of primacy in order to justify the prioritisation of the free movement provisions:

> Articles 48-66 [EEC on persons, services and capital]…implement a *fundamental principle* of the Treaty, confer on persons whom they concern *individual rights* which the national courts must protect, and *take precedence* over any national rule which might conflict with them.[84]

Placed in its historical context, this constitutional development is understandable. For instance, a fuller reading of *Van Gend* draws an explicit link between the EU's economic goals and the rights of individuals:

> The objective of the EEC Treaty, *which is to establish a common market*...implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. *This view is confirmed* by the preamble to the Treaty which refers not only to governments but to *peoples* [emphasis added].[85]

Certainly the association of free movement with individual, perhaps even fundamental, rights[86] facilitates economic integration. While its rights-status makes free movement about *more* than the internal market, the market is, itself, enabled by the deeper entrenchment of the need to protect free movement from conflicting activity, through its attachment to the exercise of individual rights. This inherently welcomes the use of a two-stage breach/justification methodology for resolving conflict between free movement and competing policy, since that model structurally secures the prioritisation of the former over the latter.

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[83] Case C-438/05 *Viking*, n.22, para.58
[84] Case 118/75 *Watson and Belmann* [1976] EU:C:1976:106, operative part, para.1
[85] Case 26/62 *Van Gend*, n.2, p.12
[86] See also Eilmansberger, n.73, 1204-1205; Prechal, n.74, 1069

Clearly, the recognition of the direct effect of the free movement provisions was not directly targeted at managing the relationship between the market freedoms and fundamental rights. Indeed, that status was conferred, in relation to the majority of the free movement provisions,[87] at a time when their material scope was restricted to directly discriminatory policy and the opportunity for interaction with fundamental rights was limited. Nevertheless, by cementing an imbalanced adjudicative model, this linguistic approach makes indirect contributions to the maintenance of this framework when free movement began to interact with fundamental rights. In this context, free movement is, in fact, elevated beyond fundamental rights status since it is treated, procedurally, as *more* fundamental than fundamental rights, potentially weakening protection of the latter norms. We have already seen, in chapter two, that the expansion of the material and personal scope of the free movement provisions has brought them into more frequent contact with fundamental rights, and that the two-stage methodology has nevertheless been retained in this context. Section four of this chapter will detail the distinct contributions that the doctrine of direct effect has made to increased interactions.

For now, however, the focus is on direct effect's *indirect* exacerbation of two-stage bias via the rights-status of the market freedoms. Evidence of this can be found, for instance, in *Laval*, in which the Court stated that the exercise of fundamental rights 'must be reconciled with the requirements relating to the *rights* protected under the Treaty and in accordance with the principle of proportionality [emphasis added]', although the Treaty does not explicitly refer to Article 56 as a 'right'.[88] It should be acknowledged, here, that the conferral of direct effect denotes the existence of individual rights in relation to other provisions of Union law, unconnected or not directly related to free movement.[89] However, it will be recalled that our analysis of the doctrine's contributions to a structural preference for free movement over fundamental rights should be understood as one factor in a wider interconnected 'constitutional trinity' of contributors to procedural imbalance.

[87] Case C-163/94 *Sanz de Lera*, n.5, concerning the direct effect of the free movement of capital was handed down after the Treaty provisions on capital were expanded from centring on discrimination and restrictions affecting the proper functioning of the internal market [Art.67 EEC] to prohibitions on all restrictions and a general focus on liberalisation of the capital market [Art.63 TFEU]. Prior to this, the Court had held in Case 203/80 *Casati* [1981] EU:C:1981:261 that capital did not have direct effect.
[88] Case C-341/05 *Laval*, n.25, para.94
[89] Case 43/75 *Defrenne* [1976] EU:C:1976:56 (concerning, Art.157 TFEU)

Direct effect has made individuals private enforcers of the market freedoms. As Craig notes, this was a crucial step in the transformation of an economic Community into a "closer union among the peoples of Europe".[90] Nevertheless, this also creates new opportunities for interaction between free movement and competing law and policy. Specifically, the possibility for individuals to argue before the courts that their ability to move across borders has been restricted allows for the discovery or demonstration, through lived experiences, of the diverse activities that can present barriers to intra-EU movement. The significance of these restrictions is intensified by their impact on individual rights.

Prima facie, this development appears to be only advantageous. Yet, the focus on the individual rights of *free movers* can arguably result in the over-prioritisation of free movement in relation to other legitimate aims, including fundamental rights. Thus, Reich argues that, as part of the neo-liberal recognition that market entry, guarantees for private property, and the exercise of professions all rely on individuals for their implementation, it was necessary to transform the economic freedoms into fundamental rights, through the concept of direct effect.[91] On the one hand, it is clear that the Union has evolved steadily beyond an economic constitution, in which new provisions of primary law recognise the importance of, for instance, social, environmental, and consumer protection.[92] However, 'it is not yet clear how far [these] reciprocal rights are guaranteed to passive market citizens: that is to what extent free choice under the freedom to provide goods and services rules…exists as a right to safety corollary to the restrictions in Article 36 on free movement'.[93] Indeed, tensions between free movement and these other objectives, some of which the Charter now presents as fundamental rights,[94] continue to be processed through the two-stage model. Under this framework, opposing rights cannot be used as a sword but merely as a shield, by which, for instance, the Member States can defend their activity against the *prima facie* unlawfulness of imposing restrictions on free movement. Moreover, as the discussion of the fundamental

[90] Craig, n.12, 457
[91] N. Reich, 'A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law', (1997) 3(2) ELJ 131, 132-133; see also de Witte, n.4, 329; Prechal, n.74, 1069. On the role of the Court in this regard, Weiler, n.45; Craig, n.13, 465-466
[92] Part Three, Title X TFEU; Art.11 TFEU, Art.12 TFEU, respectively.
[93] Reich, n.91, 139-140. As a more recent consideration, the Charter 'principles', generally thought to cover, for instance, Arts.37 and 38 CFR on environmental and consumer protection respectively, do not enjoy direct effect, pursuant to Art.52(5) CFR.
[94] Consider, for instance, the right to collective action, protected by Art.28 CFR, as providing employee voice and therefore acting as a corollary to the freedoms of establishment and services: see M. Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in P. Alston et al, *The EU and Human Rights*, (OUP, 1999), 449, 469-470

rights 'impact trio' in chapter two demonstrated, the one-sided proportionality test this triggers, and its focus on finding measures less restrictive of free movement, can result in a lowering of fundamental rights standards in real terms. For instance, labelling might be presented as an appropriate means of consumer protection where this might not fully address the presumptions made by consumers on the basis of language, or compositional norms.[95]

Finally, by individualising free movement, through the introduction or reinforcement of rights-language, direct effect has contributed to the conversion of free movement, from a mere means for completing the internal market, to an end in and of itself. This metamorphosis into independent objective will generally facilitate the internal market since it strengthens the need for the prioritisation of free movement.[96] Accordingly, free movement's status as a separate goal also indirectly reinforces the two-stage adjudicative framework and therefore the favouring of free movement over fundamental rights. Further, in some instances, this reconceptualisation of free movement can, by contrast, actually undermine its original role as a facilitator of the internal market. Specifically, the status of free movement as an independent aim can result in its prioritisation over *other* tools for achieving economic integration. Crucially, these other instruments might, in certain circumstances, present the protection of fundamental rights as critical to economic integration as opposed to obstacles to its attainment.

A clear example in this regard is the phenomenon of social dumping.[97] Broadly speaking, the internal market is presented as achievable via the twin instruments of freedom of movement, through the prohibition of barriers to trade, and the elimination of distortions to competition. Originally viewed as generally operating in separate spheres, the former relating to public

[95] Ch.2, s.3.3; Case C-315/92 *Clinique* [1994] EU:C:1994:34 (language); Case 179/85 *Commission v Germany (pétillant de raisin)* [1986] EU:C:1986:466 (packaging); Case C-317/95 *Canandane Cheese* [1997] EU:C:1997:393 (composition). See Reich, n.91, 145

[96] A. Ward, 'More than an Infant Disease? Individual Rights, EC Directives and the Case for Uniform Remedies', and T. Eijsbouts, 'Direct Effect, the Test and the Terms: In Praise of a Capital Doctrine of EU Law', Chs.3 and 9 respectively in J. Prinssen, A. Schrauwen (eds), *Direct Effect – Rethinking a Classic of EC Legal Doctrine*, (Europa Law Publishing, 2002)

[97] Although the focus here is on the relationship between social dumping and the promotion of free movement as an independent Union objective, this should be understood as one component within wider historical developments. For instance Barnard considers the expansion in the material scope of the free movement provisions to be largely responsible for the increase in concerns about social dumping: C. Barnard, 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution', in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009), ch.13, 314

activity, the latter to the actions of private individuals,[98] the removal of barriers to trade and of distortions to competition can nevertheless be viewed as complementary. For instance, the preclusion of discriminatory laws in relation to imported goods addresses the competitive advantage otherwise enjoyed by domestic commodities.[99] However, this is not the case in respect of social dumping. This is a process whereby, for instance, a service provider in a host State secures an advantage over domestic competitors by relying on its free movement rights to post workers employed in its own Member State, which has lower standards of employment. This has clear implications for fundamental rights in terms of worker protection.[100] The issue of social dumping and its effects on competition were, in fact, recognised during the inception of the EEC,[101] prompting the inclusion of Articles 119 and 120 on equal pay for men and women and paid holiday schemes, respectively, in the Rome Treaty.[102] As Barnard notes, these social provisions, which created obstacles to freedom of movement, nevertheless accordingly served an economic purpose.[103] The Court recognised this in *Defrenne*:

> In the light of different stages of the development of social legislation in the various Member States, the aim of Article 119 [EEC] is to avoid a situation in which undertakings established in states which have actually implemented the principle of equal pay suffer from a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not…[104]

Interestingly, in *Defrenne*, the CJEU also determined that this social provision enjoyed direct effect. Thus, recalling Reich's concerns above, about the extent to which social rights can exist as reciprocal considerations in the exercise of free movement, Article 119 EEC/Article 157 TFEU can operate more easily as a sword against some of the negative consequences of unrestricted free movement.

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[98] Joined Cases 177/82 and 178/82 *Van de Haar* [1984] EU:C:1984:144, paras.11-12. Although these lines are blurred, for instance, by the horizontal direct effect of some of the free movement provisions and the Treaty rules on State aid.
[99] Opinion of AG Poiares Maduro, Case C-438/05 *Viking,* EU:C:2007:292, para.34
[100] Art.31 CFR. S. Currie, 'Men on the Sidelines: The Reconciliation of Work and Family Life Agenda in the Context of Cross-Border Posting', (2013) 35(3) J. Soc. Wel. & Fam. L. 389. For a discussion of differences in, for instance, pay in the Swedish context, see E. Bengtsson, 'Social Dumping Cases in the Swedish Labour Courts in the Wake of *Laval*, 2004-2010', (2014) EID 1
[101] Report of the Heads of Delegation to the Ministers of Foreign Affairs (The Spaak Report), (Brussels, 21/05/1956), 62-63. See also Barnard, n.97
[102] Now Arts.157 and 158 TFEU
[103] Barnard, n.97
[104] Case 43/75 *Defrenne*, n.89, para.9. For recognition from other EU institutions, see the European Commission's White Paper on Social Policy COM(94) 333; Council Resolution of 6 December 1994 on certain aspects for a European social policy: a contribution to economic and social convergence in the Union, [1994] OJ C368/4, para.10

Against this background, we might expect to see the Court incorporate into its analysis the potential distortions of competition caused by the exercise of the freedoms of establishment and services in *Viking* and *Laval*, respectively, since the economic undertakings in those cases sought to take advantage of lower standards of worker protection in different Member States. This would, arguably have more readily presented worker protection and related collective action as forming part of economic integration, as opposed to conflicting with it. Instead, in *Viking*, the Court repeatedly referred to the freedom of establishment as a 'fundamental freedom' or 'right protected under the Treaty', linking this with its direct applicability in national legal orders, but making no explicit connection between this fundamental status and its role as a facilitator of economic integration.[105] Accordingly, the collective action taken by the trade unions in that case was found to be a *prima facie* breach of EU law since it rendered the exercise of free movement rights less attractive.[106] Worker protection was then assessed as a potentially permissible *derogation* from a fundamental freedom of the Treaty, rather than as forming part of a climate of fair competition.[107] Thus, even when the Court acknowledged the social purpose of the Treaty, this was presented as something to be *balanced against* rather than contemplated *as part of* the Union's economic goals.[108] Finally, the CJEU emphasised that, as part of its proportionality assessment, it would be necessary for the national court to consider whether means less restrictive of free movement, as opposed to approaches more conducive to economic integration, were available to secure worker protection.[109]

It will be recalled that the *Laval* case required, *inter alia*, examination of the applicability and operation of the Posted Workers' Directive (PWD). Prior to the CJEU's decision in *Laval*, this instrument was generally viewed as an anti social-dumping measure. For instance, while recognising the abolition of barriers to intra-EU service provision as a Union objective, the Directive's preamble acknowledged that 'the promotion of the transnational provisions of services requires a climate of fair competition, guaranteeing respect for the rights of workers'.[110] Institutional discussions leading up to the adoption of the PWD also firmly

[105] Case C-438/05 *Viking*, n.22, paras.45, 46, and 68.
[106] Para.72
[107] Para.77
[108] Para.79
[109] Para.87
[110] N.24, recital 5

rooted it in tackling social dumping.[111] Accordingly, Article 3(1)(a)-(g) PWD laid down a core nucleus of worker protection for which host Member States had to impose their rules on service providers posting workers into their territory. Moreover, Article 3(7) stipulated that Article 3(1) did not prevent the application of terms and conditions of employment that were more favourable to workers. Article 3(10) stated that the Directive did not preclude the application of measures not referred to Article 3(1)(a)-(g) for reasons of public policy.

Nevertheless, in *Laval*, the Court interpreted the core nucleus of the PWD as 'preventing a situation' whereby undertakings established in other Member States would compete unfairly against companies in the host Member State, where the level of social protection is higher.[112] Accordingly, Article 3(7) PWD was interpreted as merely not precluding the implementation of more favourable worker conditions operating in the home Member State. And yet, the very fact that the content of the Swedish collective agreements, in *Laval*, went above and beyond Article 3(1)(a)-(g) suggests the domestic undertakings could face greater worker protection obligations than service providers coming from other Member States.[113] In particular, the focus of the core nucleus on *minimum* pay prevents use of the PWD to impose national rules requiring service providers to comply with wage rates determined on a case-by-case basis, according to the skills of worker,[114] or indexed to the cost of living.[115] Currie points out that the Latvian workers in *Laval* earned around 40% less than their Swedish counterparts.[116] She argues that the effect of the CJEU's strict interpretation of the PWD in *Laval*, and also in *Rüffert*[117] is to:

> …render it more difficult, in certain circumstances…for posted construction workers to even be guaranteed the relevant levels of pay as set out in host state collective agreements. As such, posted workers may find themselves

[111] E.g. the accompanying text to the initial legislative document COD/1991/0346, 28/06/1991, '*Les entreprises non nationales seront ainsi mise à égalité avec les entreprises nationale*'; EP Decision of the Committee Responsible, 2nd reading, COD/1991/0346, 24/07/1996, 'The aim is to eliminate unfair competition by ensuring that "posted" workers do not receive lower wages and are not subject to less favourable working conditions in the member state concerned'.
[112] Case C-341/05 *Laval*, n.25, para.75
[113] This is not the case where comparable protection is already secured in the Member State of origin - see Case C-369/96 *Arblade* [1999] EU:C:1999:575 – however, *Laval* seems to remove the need to investigate the existence of equivalent protection so long as the core nucleus of the PWD is observed, unless reasons of public policy can be established.
[114] Para.70
[115] Case C-319/06 *Commission v Luxembourg*, n.20
[116] Currie, n.100, 398; see also Bengtsson, n.100
[117] Case C-346/06 *Rüffert*, n.25

entitled only to receive the general minimum wage… This potentially impacts considerably on the level of income available to…support their families in the home state'.[118]

Thus, not only does the approach in *Laval* lead to a lowering in the host State standards concerning the fundamental right to worker protection,[119] Currie also identifies consequent negative impacts on the fundamental right to family life of posted workers.[120] Further, the fundamental rights of trade unions are diminished, either because strike action taken to enforce collective agreements will constitute an unjustified breach of free movement, as in *Laval*, or because terms of collective agreements will be found not to apply in relation to posted workers, as in *Rüffert*. Barnard has posited that labour lawyers were, however, mistaken to view the PWD as a worker protection measure, since it was firmly rooted in the Treaty's chapter on services.[121] And yet, if we view that chapter as fleshing out free movement's role in economic integration, it is arguably necessary to interpret it in light of potential distortions to competition, which measures securing worker protection can be viewed as seeking to address. Nevertheless, in *Laval*, since competitive disparity is seemingly dealt with by the minimum standards of the PWD, worker protection and the fundamental right to collective action are determined to be disproportionate restrictions on the free provision of services, rather than as components of competitive equality. Indeed, in a separate part of the *Laval* judgment, concerning the Swedish *Lex Britannia* – which treated foreign service providers bound by collective agreements signed in other Member States as akin to national undertakings who had signed no agreement at all – the Court stated that the creation of a climate of fair competition could not constitute a justifiable restriction on Article 56 TFEU since it did not feature in its accompanying Treaty derogation.[122]

This subsection has postulated that by individualising the free movement provisions, and therefore introducing/reinforcing the use of rights-language in relation to them, the doctrine of direct effect has reinforced the Court's two-stage breach/justification methodology and, therefore, indirectly contributed to the structural subjugation of fundamental rights to the free movement provisions. Direct effect has also made individuals private enforcers of the market freedoms. This inevitably leads to an increase in the volume of conflictual interactions

[118] N.100, 398
[119] Art.31 CFR
[120] Art.8 ECHR; Art.7 CFR
[121] Barnard, n.97, 326
[122] Case C-341/05 *Laval*, n.25, para.118, although this was due to the Swedish Law's directly discriminatory nature.

between free movement and other law and policy, including fundamental rights, as individuals confirm or demonstrate, through their lived experiences, the negative impact of diverse activity on their exercise of free movement. This can intensify structural bias since competing rights, such as consumer protection, which might be viewed as the static corollary of the exercise of free movement, do not always enjoy direct effect and cannot therefore be enforced on an equal footing with free movement. Finally, the individualisation of free movement has converted it from a tool for attaining economic integration to an independent goal in its own right. This not only deepens the perceived need for the prioritisation of free movement, thereby strengthening the two-stage model, it can also rank the pursuit of free movement over *other* tools of economic integration that would, in some instances, *complement* rather than conflict with the protection of fundamental rights.

Yet, aside from indirectly reinforcing structural bias, the direct effect of the free movement provisions within domestic legal orders does not prescribe, on its own, the prioritisation of free movement by national courts. Where EU provisions form part of domestic law, by virtue of their direct effect, they enter an existing legal framework of myriad laws and regulations, structured through an internal hierarchy of norms. At the apex of such hierarchies is usually national constitutional law,[123] often containing fundamental rights.[124] Other domestic constitutional mechanisms stipulate that laws are impliedly repealed by more recent, conflicting law.[125] In this context, the direct effect of the free movement provisions within national legal orders would not necessarily lead to their prevalence over competing norms, particularly those of a constitutional nature.[126] However, this has been addressed, at EU-level, by the introduction of the doctrines of primacy and effective judicial protection, which, together, render national measures immediately inapplicable to the extent that they conflict with Union law. Since these principles apply to domestic rules *of any nature*, they provide outputs for direct effect's contributions to a structural preference for free movement in conflicts with fundamental rights. Accordingly, the next section will assess primacy and effective judicial protection as aggravators of architectural imbalance.

[123] See e.g. Art.46 French Constitution 1958; Art.20(3) Basic Law for the Federal Republic of Germany 1949 [German Basic Law]
[124] See e.g. Arts.1-19 German Basic Law
[125] For instance, the doctrine of parliamentary sovereignty in UK constitutional law broadly stipulates that Parliament cannot bind itself for the future. However, the French Conseil d'Etat has also disapplied French 'lois' where they have conflicted with posterior law on the basis of chronology and the will of Parliament, CE 11 déc 1987 *Danielou* 409.
[126] Art.25 German Basic Law and Art.55 French Constitution permits international law to take precedence over ordinary legislation but this does not include constitutional law.

3. The principles of primacy and effective judicial protection: providing outcomes for structural imbalance

The principles of primacy and effective judicial protection, as significant constitutional doctrines within EU law, have warranted substantial academic discussion in their own right.[127] The focus here, however, is on their capacity to aggravate direct effect's reinforcement of a constitutional weighting towards free movement in instances of clash with fundamental rights. Accordingly, the discussion will limit itself, first, to discussing the concretisation of the two-stage model by the principle of primacy, which, by its nature, obliges a structural preference for free movement over competing law. The section will demonstrate, second, that even where domestic measures are permissible in principle, by virtue of their pursuit of an overriding interest accepted under Union law, they will not be justified in practice if they fail to meet the requirements of proportionality. Where this occurs, the combination of primacy and effective judicial protection requires the *immediate* disapplication of domestic law. This 'all or nothing' approach can result in a legal lacuna of fundamental rights protection in practice, even though the CJEU has accepted the need to protect them in principle. The section will assess, third, how, in some cases, the principle of effective judicial protection can lead national courts to allow actions for damages against private individuals who exercise their fundamental rights in breach of directly effective and prevailing free movement law, even where this would not be the case in the domestic legal framework. As with direct effect, the doctrines of primacy and effective judicial protection are of wider application than the free movement provisions. Accordingly, they should be viewed, here, as one of many factors in the multifaceted historical development of a free movement bias.

The doctrine of primacy was established in the seminal *Costa* case, in which the Court stated that 'the law stemming from the Treaty…could not, because of its special and original nature,

[127] On primacy, see, for instance, N. MacCormick, *Questioning Sovereignty*, (OUP, 1999); A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', (2008) 6 I-CON 397. On effective judicial protection, see, for example, P. Wattel, 'National Procedural Autonomy and Effectiveness of EC Law' (2008) 35 LIEI 109; M. Hoskins, 'Tilting the Balance: Remedies and National Procedural Rules' (1996) 25 ILJ 153

be overridden by domestic legal provisions, *however framed* [emphasis added]…'[128] Accordingly, in the context of our discussion, not only are the free movement provisions directly effective within the national legal orders, but they also have primacy over competing domestic norms.[129] The Court's reference to national law 'however framed' suggested that Union law had supremacy even over national constitutional law, including fundamental rights safeguards contained therein. This was confirmed in *Internationale Handelsgesellschaft* in which the CJEU declared that 'the validity of a Community measure or its effects within a Member State *cannot be affected by allegations that it runs counter to…fundamental rights as formulated by the Constitution* of that state…[emphasis added]'.[130]

Prima facie, this appears to suggest that national rules, including fundamental rights measures, are not even capable, in cases of conflict, of derogating from directly effective EU law, such as the free movement provisions, since EU law is hierarchically superior. This would seem to necessitate not a breach/justification model but rather an even more heavily weighted one-stage approach that would set fundamental rights aside once a restriction on free movement is established. Alternatively, the Treaty itself contained derogating provisions, permitting restrictions on free movement as a matter of EU law.[131] Further, in *Internationale,* itself, the CJEU introduced fundamental rights protection at EU-level in order to mitigate the effects of the primacy of Union law on domestic fundamental rights:

> [A]n examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.[132]

Thus, although the Treaty derogations from free movement do not include protection of fundamental rights, they have presented permissible restrictions on the market freedoms in

[128] Case 6/64 *Costa v ENEL* [1964] EU:C:1964:66, p.594
[129] There is debate in the commentary as to whether the operation of the doctrine of primacy is dependent on a provision's being directly effective (trigger model) or whether national courts are obliged to apply this principle regardless of direct effect status. See M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', (2007) 44 CMLRev 931; De Witte, n.4
[130] Case 11/70 *Internationale Handelsgesellschaft* [1970] EU:C:1970:114, para.3
[131] Arts.36, 45(3), 52(1), 62, and 65(1)(b) TFEU
[132] N.130, para.4

Schmidberger and subsequent cases.[133] Since the development of primacy requires respect for fundamental rights as a matter of EU law, it could therefore be argued that primacy promotes equality between the free movement provisions and fundamental rights, rather than a structural preference for the former. However, it is submitted here that the historical development of fundamental rights protection, as a necessary response to the primacy of Union law, in fact, reinforces an adjudicative model that presents fundamental rights as derogations from free movement, to be interpreted *strictly*.

First, according to *Internationale,* fundamental rights 'must be ensured *within the framework of the structure and objectives*' of the Union. This indirectly invites the slotting of tensions between EU law and fundamental rights into existing adjudicative frameworks, such as the two-stage model. The reference to the objectives of the Union also arguably sets the parameters of fundamental rights protection according to the economic endeavours of the Treaty. Since free movement seeks to facilitate the internal market, this also supports its structural prioritisation. Through repeated use, the entrenchment of such a model would continue to support a preference for the economic even after the Union's aims diversified.[134]

Second, although *Internationale* introduced fundamental rights to the Union legal order, these existed as general principles, and without the Union having competence in this field. Accordingly, fundamental rights are drawn from the *domestic* constitutional traditions as well as, later, the international agreements to which the *Member States* are signatories.[135] Similarly, although restrictions on free movements are permissible as a matter of Union law, via the Treaty's derogating provisions or later the mandatory requirements, these frequently cover fields for which the Union has limited legislative competence.[136] This creates something of an historical paradox within EU fundamental rights protection whereby fundamental rights are protected at EU-level but usually emanate from national restrictions on Union law. This is particularly visible in *Omega* in which the Court drew on the German recognition of the fundamental right to human dignity, which was also Germany's justification for limiting the free provision of services, in order to recognise that right within the Union legal order.[137]

[133] Case C-112/00 *Schmidberger*, n.6; Case C-36/02 *Omega*, n.16; Case C-438/05 *Viking*, n.22
[134] For discussion of the expansion in Union goals, see ch.1, s.4.3.2.1.
[135] Case 4/73 *Nold* [1974] EU:C:1974:51
[136] E.g. the Union only has complementary competence in the field of human health: Arts.6 and 168 TFEU
[137] Case C-36/02 *Omega*, n.16, paras.32-34

Accordingly, fundamental rights continue to be presented as national derogations from Union law, subject to judicial control at EU-level.[138]

Consequently, although the existence of the Treaty derogations and the general principles[139] mitigate against a finding that all competing law is automatically overridden by the primacy of the free movement provisions, the continued presentation of fundamental rights as a national derogation from free movement tilts the doctrine towards free movement. Arguably, a principle that dictates that Union law must prevail over conflicting law concretely reinforces the notion that, if derogations from free movement are to be permitted at all, they must be interpreted *strictly* and only be justified where they impose the fewest restrictions on the market freedoms.[140] This is also reflected in the language of the Court in *Omega, Viking* and *Laval,* in which it presents fundamental rights as a legitimate interest 'even' against the fundamental principle of free movement.[141] This arguably works in tandem with the 'unconditionality' of free movement as a result of its direct effect status. Although the Union still lacks legislative competence in the general field of fundamental rights, it remains to be seen how the primary legal status of the Charter will impact on this historically entrenched approach, since this provides a means by which fundamental rights can be drawn directly from an instrument of EU law. In the pre-Lisbon cases of *Viking* and *Laval,* the Court recognised the existence of the fundamental right to strike by virtue of Article 28 CFR. However, this did not alter the Court's two-stage approach to the clash between this right and the freedoms of establishment and services respectively. Nevertheless, post-Lisbon, we see the Court drawing more frequently on the Charter in its fundamental rights assessments, especially outside primary law, demonstrating some potential in this regard.[142]

As well as supporting the two-stage justification model, the doctrine of primacy, alongside the principle of effective judicial protection, places fundamental rights protection at further risk where fundamental rights measures, representing justifiable restrictions on free movement *in*

[138] Para.30
[139] And now the Charter
[140] Case 36/02 *Omega,* n.16, paras.30 and 36. Although the Court in that case elected to offer a wide margin of discretion to the Member State, this was not the case in e.g. Case C-438/05 *Viking,* n.22 or Case C-341/05 *Laval* n.25. In any case, in *Omega*, fundamental rights protection was still processed through a one-sided proportionality assessment. The ban on laser-game services was permitted as a *derogation* from EU law in exercise of *Germany*'s discretion in the field of fundamental rights, rather than as a matter of Union law.
[141] Ibid, para.35; Case C-438/05 *Viking*, n.22, para.45; Case C-341/05 *Laval*, n.25, para.93
[142] Case C-271/08 *Commission v Germany* [2010] EU:C:2010:426; Case C-544/10 *Deutsches Weintor* [2012] EU:C:2012:526. The effect of the post-Lisbon constitutional environment on the two-stage approach is discussed in more detail in ch.5

principle, have not been able to overcome the breach/justification framework *in practice*. This is because primacy requires national rules to be set aside as a result of the restrictions they place on free movement law, while the principle of effective judicial protection requires this to be done immediately.[143] In other words, while the finding by the Court that the safeguarding of fundamental rights is justified in principle suggests a need for fundamental rights measures, there will be a legal vacuum in this regard until the relevant Member State adopts rules less restrictive of free movement. The combined force of direct effect, primacy and effective judicial protection in this respect is summarised by the Court in its *Winner Wetten* judgment:

> …in accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures…have the effect, in their relations with the internal law of the Member States, merely by entering into force, of rendering automatically inapplicable any conflicting provisions of national law.[144]

Thus, the finding in *Rüffert*,[145] that a German law requiring local authorities to impose the minimum pay requirements contained in local collective agreements could not be justified by the goal of worker protection[146] *inter alia* because it applied only to public contracts, provokes the requirement that national courts immediately disapply this law in relation to service providers posting workers from other Member States. Similarly in *Laval*, the finding that the Swedish approach to determining minimum pay was too imprecise to comply with Article 56 TFEU would seemingly suspend the application of basic wage mechanisms to posted workers until this matter had been resolved domestically. This also triggered the question of to what extent trade unions could exercise their fundamental right to strike in this regard.[147] In short, this 'all or nothing' approach arguably does not leave the Member States with sufficient breathing space to safeguard fundamental rights while in the process of devising less restrictive fundamental rights approaches.

However, the Court did open a door to the possibility of a temporary suspension of primacy in future cases in *Winner Wetten* itself.[148] The case concerned a German law that made it a

[143] Case 106/77 *Simmenthal* [1978] EU:C:1978:49, paras.14-15
[144] Case C-409/06 *Winner Wetten v Bürgermeisterin der Stadt Bergheim* [2010] EU:C:2010:503, para.53, citing Case 106/77 *Simmenthal*, ibid and Case C-213/89 *Factortame a.o* [1990] EU:C:1990:257, para.18
[145] Case C-346/06 *Rüffert*, n.25
[146] Recognised by Art.31 CFR
[147] Case C-341/05 *Laval*, n.25
[148] Case C-409/06 *Winner Wetten* n.144; T. Beukers, 'Case C-409/06, *Winner Wetten GmbH* v. *Bürgermeisterin der Stadt Bergheim*, Judgment of the Court (Grand Chamber) of 8 September 2010' (2011) 48(6) CMLRev 1985,

criminal offence to operate public games of chance without the authorisation of a public authority. The Land of Nordrhein-Westfalen had authorised one company, Westdeutsche Lotteries, to offer such games. Consequently, Winner Wetten, a German undertaking that brokered bets for a company established in Malta, was prohibited from pursuing this activity. It subsequently argued that this was a breach of the freedom of services, pursuant to Article 56 TFEU. The *Bundesverfassungsgericht* had already held, in a separate judgment, that a monopoly on betting infringed the fundamental right to pursue an occupation, protected by German Basic Law, since it did not ensure a reduction in gambling and addiction effectively. Accordingly, it had a disproportionate effect on fundamental rights. Nevertheless, the *Bundesverfassungsgericht* held that the legislative restrictions on gambling could be maintained during a transitional period while the legislature addressed the issue at hand, so long as there was a minimum level of consistency between combatting gambling addiction and the effective existence of a monopoly. However, the national court in *Winner Wetten* accepted that the domestic measure was also a breach of Article 56 TFEU, which could not be justified in practice. Consequently, it referred to the CJEU the question of whether the legislation could nevertheless remain in place for a transitional period, during which the national legislature would devise alternative means of reducing gambling addiction. Referring to its case-law on invalidity actions against Union legislation, the Luxembourg Court held that:

> [T]he [temporary] maintenance of the effects of a Union measure…the purpose of which is to prevent a legal vacuum…may be justified where overriding considerations of legal certainty…are at stake.[149]

Nonetheless, it proceeded to declare that, 'even assuming' that, by analogy, this allowed for the provisional suspension of the ousting effect of a directly applicable Union measure on national law, this would be determined solely by the Court of Justice. Moreover, the condition of overriding reasons of legal certainty had not been met in *Winner Wetten* itself, since the national courts had themselves admitted that the domestic measure was not capable of

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2000. To some extent the principle of mutual trust, in the context of dual regulatory burdens, can also be viewed as reducing the risk of legal vacuums. However, it should be recalled from ch.2, s.3.3.2 that this doctrine does not necessarily sufficiently cater for the idiosyncratic fundamental rights needs of the Member States. Moreover, in market access cases the existence of similar measures in the home State, where this is even relevant to the case, is not part of the breach rationale. Further, in *Laval*, *Rüffert*, and *Commission v Luxembourg*, the interpretation of the PWD as a ceiling of protection generally precluded future consideration of whether comparable protection was offered in the home State.

[149] Paras.65-66

meeting the objective of combatting gambling addiction in a consistent and systematic manner.[150]

The Court's use of the phrase 'even assuming' does not suggest much enthusiasm for the transfer of temporary suspensions of primacy into the adjudication of the relationship between free movement and conflicting national law. Indeed, subsequent cases citing *Winner Wetten* have focused on reinforcing the general rule, originating with *Simmenthal*,[151] that the principle of effective judicial protection requires the *immediate* setting aside of opposing domestic measures.[152] Nevertheless, the Court's application of the requirements for suspension in *Winner Wetten* itself is a clear illustration of its introduction to the area. However, it remains uncertain *how* suspensions will operate. What seems clear is that domestic fundamental rights measures, found to be legitimate in principle but having failed to overcome the proportionality test at the justification stage, will face a second procedural disadvantage in the requirement that they demonstrate *overriding* reasons of legal certainty in order to trigger a transitional period. Moreover, this assessment is inextricably linked to the question of whether domestic measures could be justified at all during the prior breach/justification assessment, arguably reducing the possibility that a transitional period will be available in practice. For instance, in *Winner Wetten,* itself, the fact that the national rules did not reduce gambling addiction in a consistent and systematic manner would seem to be the reason that they did not constitute a justified restriction on free movement in the first place. Accordingly, asking the same question to assess the availability of a transitional period arguably sets the domestic measure up to fail. Similar conclusions could be drawn in relation to *Rüffert*. Since the German rule did not ensure the application of minimum wage rules contained in collective agreements in a consistent and systematic manner, as they applied only to public contracts, presumably this measure could not be maintained while Germany rectified this inconsistency. This introduces broader questions about how else the Court might determine the permissibility of transitional periods. For instance, would Swedish rules on determining minimum pay fail to qualify for temporary retention because they 'lacked clarity and precision' even though this was also why they failed to be justified in the first place in *Laval*?

[150] Paras.67-68
[151] Case 106/77 *Simmenthal*, n.143
[152] Case C-606/10 *ANAFE* [2012] EU:C:2012:348, para.73; Case C-416/10 *Križan a.o.* [2013] EU:C:2013:8, para.70

Nevertheless, the possibility of temporarily suspending the principle of primacy in order to avoid legal lacunae is to be welcomed since it introduces a potential means of addressing the current 'all or nothing' approach of primacy and effective judicial protection, whereby fundamental rights are left unprotected when domestic measures for safeguarding them fail to meet the proportionality requirements of the two-stage model. Transitional periods are arguably also critical from a democratic perspective since they create legal space for political institutions to make choices about how to implement programmatic fundamental rights. Although this did not appear to be a relevant consideration for the CJEU, it was a significant factor in the decision of the *Bundesverfassungsgericht* provisionally to suspend the primacy of German Basic law over national legislation. As Beukers argues, if separation of the tasks of the judiciary and the legislature form a crucial part of the national identity of the Member States then the CJEU might be required to take this into account in its own criteria on transitional periods.[153] This is particularly pertinent since the strengthening of the Treaty's national identity clause, post-Lisbon.[154]

The principle of effective judicial protection also requires that national courts adequately protect the free movement rights of individuals where they have been infringed. Initially, the CJEU had underlined that remedies for breaches of Union law were to be determined according to domestic rules. This was as long as these were proportionate, did not make the exercise of EU rights impossible or excessively difficult in practice, and were equivalent to the forms of action available in relation to violations of national law.[155] Member States were not required to introduce remedies that would not be available under domestic rules.[156] However, the Court later added the requirement that national procedural rules secured the *effective* protection of the individual rights enjoyed pursuant to EU law, including those relating to free movement.[157] This has required the introduction of remedies to secure the effective safeguarding of free movement rights that would not otherwise operate in the domestic legal order.[158] This development potentially favours free movement over other types of rights that, not emanating from Union law, would not enjoy as extensive a range of judicial protection. As Advocate General Jacobs has acknowledged, in the context of competition law,

[153] Beukers, n.148, 2002
[154] Art.4(2) TEU
[155] Case 13/68 *Salgoil*, n.5; Case 33/76 *Rewe v Landwirtschaftskammer für das Saarland* [1976] EU:C:1976:188
[156] Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] EU:C:1981:163
[157] Case 222/86 *Heylens*, n.53
[158] Case C-213/89 *Factortame* n.144; Joined Cases C-397/98 *Metallgesellschaft a.o.*, C-410/98 *Hoechst v Commissioner of Inland Revenue and HM Attorney General* [2001] EU:C:2001:134

there exists a risk that greater protection will be afforded to Union rights that are not, by virtue of that status, inherently of greater importance than rights recognised by national law.[159]

One means of securing effective judicial protection, that is particularly relevant to our discussion, is the requirement, in some circumstances, that national courts oblige private parties to pay damages where they have restricted the rights that other private parties enjoy under EU law. This can be the case even where a bar on damages would operate at the national level. Thus, in the competition law case of *Courage v Crehan*, Crehan, who had signed an anti-competitive agreement for the purchase of beer with Courage, brought a claim for damages against Courage, in light of this breach of Article 101 TFEU.[160] Such an action was precluded under English law because it viewed Crehan, being a party to the agreement, as a cause rather than a victim of anti-competitive conduct. However, the CJEU held that since Article 101 TFEU had direct effect, it created rights for *all* individuals under EU law, which the national courts must safeguard. It reasoned that the full effectiveness of Article 101 would be at risk if it were not open to any individual, including parties to the anti-competitive contract, to claim damages.[161] Accordingly, an absolute bar to Crehan's claim was contrary to Union law.[162] However, in laying down domestic procedural rules to protect the rights conferred by Article 101, national courts were able to take account, *inter alia*, of the fact that litigants should not benefit from their own unlawful conduct where they bear a significant responsibility for distortions to competition. This required consideration of whether the party claiming damages was in a 'markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract'.[163]

Since the majority of the free movement provisions now enjoy some form of horizontal direct effect,[164] the option of suing private parties for breaches of EU law, introduces the possibility that actions for damages will be brought against private individuals who exercise fundamental rights in violation of free movement rules. Indeed, in his Opinion in *Viking*, Advocate General Poiares Maduro, having determined that Article 49 TFEU was directly effective against trade

[159] Case C-430/93 *Van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] EU:C:1995:185 (Opinion), para.27
[160] Case C-453/99 *Courage v Crehan* [2001] EU:C:2001:465
[161] Para.23-26
[162] Para.28
[163] Paras.29-33
[164] The conferral of horizontal direct effect on the market freedoms will be discussed in detail in s.4.2.

unions exercising their fundamental right to strike, nevertheless stated, citing *Courage*, that 'should there be no remedy available, because domestic law does not provide a cause of action through which to challenge a breach of the right to freedom of movement, then, in accordance with the principle of effectiveness, the claim can be based directly on the free movement provision'.[165]

The direct implications of this are visible in the *BALPA* saga, outlined in chapter one. It will be recalled that BALPA, a trade union representing airline pilots, had successfully balloted for strike action in relation to British Airlines' (BA) plan to establish a subsidiary in another Member State. BA brought an action seeking an injunction against strike action, on the grounds that it would be a breach of its freedom of establishment, and seeking unlimited damages for any action taken. Faced with this prospect, BALPA withdrew from proceedings. Under English law, claims for damages against trade unions are generally viewed as 'proceedings in tort'. Subject to s.22 Trade Union and Labour Relations (Consolidation) Act 1992, available damages against trade unions in tort are capped. However, Apps has speculated that this provision might not apply in respect of '*Viking* actions'.[166] A cap would inhibit the *effectiveness* of the judicial remedy as it would not fully compensate the employer for the considerable costs to business caused by industrial action. It might also fail the requirement of *equivalent* protection because uncapped damages may be claimed against other private parties and against Member States in comparable proceedings in tort. Ewing and Hendy consequently consider that the spectre of unlimited damages 'imperils the very existence of a trade union for taking what is no more than trade union action'.[167]

For Apps, the potential resultant chilling effect on the exercise of the fundamental right to strike is exacerbated by the lack of precision in relation to trade union liability for breaching free movement. She argues, amongst others,[168] that the CJEU's reliance on the case-law on emanations of the State[169] to apply the free movement provisions directly to trade unions introduces the question of whether the availability of damages is assessed by reference to the

[165] Case C-438/05 *Viking*, n.99, paras.49-54
[166] K. Apps, 'Damages against Trade Unions after *Viking* and *Laval*' (2009) 34(1) ELRev 141, 151. She argues by way of analogy with the removal of caps in relation to sexual discrimination in Case C-271/91 *Marshall v Southampton and South West Hampshire AHA* [1993] EU:C:1993:335
[167] K. Ewing, J. Hendy, 'The Dramatic Implications of *Demir and Baykara*', (2010) ILJ 2, 44-47
[168] B. van Leeuwen, 'An Illusion of Protection and an Assumption of Responsibility: The Possibility of Swedish State Liability after *Laval*', (2011-2012) 14 CYELS 453
[169] E.g. Case C-36/74 *Walrave*, n.80

rules on State liability, under *Francovich*,[170] or purely private liability under *Courage.* As a brief aside, although not strictly an example of direct effect, the possibility, post-*Francovich*, of bringing a claim for damages against the State for failing to implement Union law, made possible, in *Schmidberger*, an action for damages against Austria for its decision not to take positive steps to restrict the fundamental rights to freedom of expression and association.[171]

The issue of how to assess whether trade unions will owe damages to economic actors for restricting their free movement rights is, in fact, significant. Actions for State liability require the demonstration, *inter alia*, of a 'sufficiently serious' breach of EU law,[172] whereas *Courage* does not appear to impose such an obligation.[173] As van Leeuwen remarks, 'the result now appears to be that, in EU law, private liability damages are easier to establish than State liability'.[174] However, Apps notes that the application of a 'sufficiently serious' criterion could act as an important safeguard. Specifically, she postulates that breaches of Articles 49 and 56 TFEU by trade unions who have not been able to overcome the strict proportionality test laid out in *Viking* and *Laval*, should not be considered 'sufficiently serious' where they are the result of the exercise of fundamental rights.[175] Conversely, Bernitz and Reich consider the 'sufficiently serious' requirement to be linked to the discretion frequently offered to Member States in their implementation of Union law. They consequently consider this criterion to be inapplicable to trade unions as private parties.[176]

Bernitz and Reich also reviewed the subsequent assessment, by the Swedish Labour Court, of damages owed by the trade unions in *Laval*, following the finding that they had breached Article 56 TFEU. Although there was no direct precedent for the requirement that national courts impose damages on private parties who breach Article 56 rights, the national court found that this obligation existed, by analogy with *Courage*, but also *Raccanelli*, concerning the free movement of workers.[177] Laval was awarded SEK 550 000 in exemplary damages

[170] Case 6/90 *Francovich*, n.6
[171] Case C-112/00 *Schmidberger*, n.6. Arts.10 and 11 ECHR.
[172] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany/ex p. Factortame a.o.* [1996] EU:C:1996:79, para.51.
[173] See also the Opinion of AG van Gerven in Case C-128/92 *Banks v British Coal Corp* [1994] EU:C:1993:860, para.53
[174] Van Leeuwen, n.168, 464
[175] Apps, n. 166, 149
[176] U. Bernitz, N. Reich, 'Case No. A 268/04, The Labour Court, Sweden (Arbetsdomstolen) Judgment No. 89/09 of 2 December 2009, *Laval un Partneri Ltd.* v. *Svenska Byggnadsarbetareforbundet et al*' (2011) 48 CMLRev 603, 617-618
[177] Case C-94/07 *Raccanelli* [2008] EU:C:2008:425

and the unions were additionally ordered to pay litigation costs of SEK 2 100 000, a total cost to the unions of around EUR 290 000. Although deploring the decision of the Swedish Labour Court not to refer the question of damages to the CJEU,[178] Bernitz and Reich consider the national court's reasoning to be justifiable by reference to the CJEU's approach to compensation which, they argue 'starts from the principle that EU law contains an "inherent" general rule on compensation for wrongs violating rights vested in individuals' pursuant to the *Francovich* ruling.[179] Although they accept that *Francovich* concerns State liability, they posit that direct effect, itself, requires the extension of this general rule to private parties since in *Peter Paul*, the CJEU stated that potential victims are entitled to compensation where the relevant EU law 'confers rights upon the individual'.[180] Accordingly, Bernitz and Reich postulate that this approach 'is not limited to the State as a tortfeasor, but [extends] to every entity which is obliged by the direct effect of EU law [to respect free movement rights], including labour unions under *Viking* and *Laval'*.[181] Thus, it is the combined forced of direct effect and effective judicial protection that permits damages claims against trade unions for the exercise of their fundamental rights.

Nevertheless, Apps has argued that the UK cap on damages in relation to trade union liability could be justified by reference to inherent asymmetry in the collective bargaining relationship between worker and employer and the need of trade unions to protect the fundamental right to association of its members without the threat of unlimited damages.[182] Even if the rules on private liability were to apply in relation to damages imposed on trade unions, such a cap might also be possible by virtue of inverting the CJEU's reasoning in *Courage* that the availability of damages for a party to an anti-competitive agreement required consideration of whether that party occupied a 'markedly weaker market position'. Indeed, the analysis of AG Poiares Maduro in his Opinion in *Viking*, hints at a prior endorsement of these arguments:

> The Court may apply different levels of scrutiny, depending on the source and seriousness of the impediment to the exercise of the right to freedom of movement, and on the force and validity of competing claims of private autonomy.[183]

[178] N.176, 605
[179] N.176, 613
[180] Case C-222/02 *Paul a.o.* [2004] EU:C:2004:606, para.49
[181] N.176, 613-614
[182] N.166, 152
[183] Case C-438/05 *Viking*, n.99, para.49

Nonetheless, as Apps remarks, the very existence of trade union liability, coupled with the uncertainty, which has engendered the speculation above, as to how the extent of that liability will be determined, is likely to result in a chilling effect in relation to the exercise of the fundamental right to collective action by trade unions. She notes, in addition, that this is exacerbated by the fact that, if the conditions of private liability are applied, trade unions might face claims for damages not only from the market actor against whom they initiated strike action, but also any economic undertakings with whom that actor had dealings and who suffered the knock-on effects of such action.[184]

This section has demonstrated the aggravation of direct effect's contributions to a structural preference for free movement in its interactions with fundamental rights by the doctrines of primacy and effective judicial protection. Where directly effective free movement provisions enter the national legal order, the supremacy of Union law ensures that they prevail over opposing domestic rules, including those of a constitutional nature. This inherently invites the prioritisation of free movement over national fundamental rights. This has not been mitigated, but instead reinforced, by the incorporation of fundamental rights into the EU legal order since these are frequently drawn from national constitutional traditions and are still presented as derogations from Union law. The combination of the doctrine of primacy with the principle of effective judicial protection also results in an 'all or nothing' approach to the protection of fundamental rights. Specifically, though the need to safeguard fundamental rights might be accepted by the CJEU *in principle*, national implementing measures will, nevertheless, be disapplied *immediately* where they are not justified in practice. This results in a gap in legal protection while fundamental rights measures less restrictive of free movement are devised. Although the Luxembourg Court has opened the door to the possibility of temporarily suspending the application of primacy to deal with this issue, how such transitional periods will operate in practice is far from clear. Finally, the principle of effective judicial protection has created the possibility that private parties will face actions for damages where they exercise their fundamental rights in breach of the free movement provisions. There is already evidence that this is having a chilling effect on exercise of the fundamental right to strike for those who risk being exposed to damages actions, possibly without the protection of domestic caps. This lack of clarity in relation to damages actions against trade unions itself impacts on their ability confidently to exercise their fundamental rights.

[184] N.166, 147

Our discussion thus far has been focused on the indirect contributions direct effect has made to the development of a two-stage breach/justification framework as part of its broader historical evolution, as well as on the aggravation of these contributions by related doctrines. However, the next section is concerned with assessing the distinct impact of direct effect on the increased exposure of fundamental rights to a structural preference for free movement. Specifically, it will chart the growth in interactions between free movement and fundamental rights as a result of the expansion from vertical through to horizontal direct effect. The section will posit, second, that direct effect has also altered the nature of the interface, requiring private parties, at times, to rely on derogations for their restrictions on free movement that are primarily designed for Member State actors, leaving them ill-equipped for justificatory claims based on their private exercise of fundamental rights.

4. The distinctive contribution of direct effect to architectural imbalance: the expansion of direct effect from State to the individual

Much of the discussion above already demonstrates that the vertical direct effect of the free movement provisions, which furnishes individuals with the ability to argue that the actions of the State are in breach of their free movement rights, has created concrete opportunities for the free movement provisions to interact with fundamental rights. *Omega, Rüffert* and *Commission v Luxembourg* provide specific examples in this regard, although the intertwining contributions of the rest of our constitutional trinity should not be forgotten.[185] Consequently, this section will focus on the effects of extending the direct effect of (some of) the free movement provisions beyond vertical direct effect on the level of interaction with fundamental rights. Specifically, it will argue that both the extension of vertical direct effect into horizontal disputes, and then the introduction of purely horizontal direct effect, has increased the frequency of contact between the market freedoms and fundamental rights.

4.1. Vertical direct effect within a horizontal dispute

[185] Case C-36/02 *Omega*, n.16 (fundamental right to human dignity); Case C-346/06 *Rüffert*, n.25 (fundamental right to collective bargaining, Art.28 CFR, and the fundamental right to fair and just working conditions, Art.31 CFR); Case C-319/06 *Commission v Luxembourg*, n.20 (fundamental right to fair and just working conditions).

Vertical direct effect within horizontal disputes frequently concerns an action between two private parties in which private party 'A' contends that the conduct of private party 'B' is contrary to a national rule. Private party 'B' argues that it must be permitted to continue its activity since the domestic measure is itself in breach of free movement provisions, which are directly effective and prevailing within the national legal order.[186] Accordingly, the issue is vertical to the extent that it is a Member State rules that is challenged. However, a decision in favour of free movement, and the resulting disapplication of national rules, would nevertheless impact on the outcome of the horizontal dispute, obliging private parties to act differently. This includes cases in which the domestic measure seeks to protect a nationally-recognised fundamental right.

For instance, in *Familiapress*,[187] it was an Austrian newspaper that sought an order preventing a German publisher from selling, in Austria, its publications, which contained prize draws contrary to Austrian law. It will be recalled from previous chapters that this domestic measure sought to ensure a greater range of publications in Austria, and thus protect the fundamental right to freedom of expression. The German publishers argued that the Austrian rule could not be applied since it was contrary to the free movement of goods. Working through its standard two-stage approach, the CJEU agreed that the ban constituted a restriction of Article 34 TFEU and it consequently fell to the national court to determine whether this *prima facie* wrongful conduct could be justified.

Similarly, in *Dynamic Medien*,[188] a private company brought an action against its competitor for selling DVDs, imported from the UK, in contravention of a German law on the protection of young people. The competitor argued that the German measure was itself in breach of the free movement of goods and must be set aside. The CJEU again used the two-stage framework to adjudicate this conflict. Since this model is weighted towards free movement, the Court did not ask whether the competitor was acting in breach of the fundamental rights of the child, and whether this could be justified. The question, instead, was whether the German rule, as a restriction of Article 34 TFEU, was warranted.

[186] Case C-33/97 *Colim NV v Bigg's Continent* [1999] EU:C:1999:274; Case 74/76 *Iannelli v Meroni* [1977] EU:C:1977:51; Case C-159/00 *Sapod Audic v Eco Emballages* [2002] EU:C:2002:343
[187] Case C-368/95 *Familiapress*, n.23
[188] Case C-244/06 *Dynamic Medien*, n.23

Accordingly, in both *Familiapress* and *Dynamic Medien* we see the importation of a structural preference for free movement into new interactions between free movement and fundamental rights, caused by the expansion of vertical direct effect into horizontal disputes. These cases concern the use of free movement rules as a shield to prevent the application of a domestic fundamental rights measure in a dispute between private parties. This can also be termed triangular effect. A second type of triangular situation arises where there is a formally vertical dispute between an individual and a Member State but this, in reality, represents tensions between two private parties. In the context of directives, the Court has held that 'mere adverse repercussions on the rights of third parties…do not justify preventing an individual from relying on the provisions of a directive against the Member State…'[189] This could have profound effects on fundamental rights protection. For instance, in a factually similar situation to *Schmidberger*, once the decision had been made to allow the demonstration to proceed, affected undertakings could challenge that decision as a breach of Article 34 TFEU prior to the protest, in order to prevent demonstrators from exercising their fundamental rights to freedom of expression and association that thereby restricts a transit route for economic undertakings.

4.2. Purely horizontal situations

As well as being used as a shield against the application of Member State fundamental rights rules, private parties may invoke some of the free movement provisions as a sword directly against the private exercise of fundamental rights. This is a direct result of their horizontal direct effect, allowing them to be utilised in actions against private parties.[190]

The first steps in bestowing horizontal direct effect on certain of the free movement provisions can be observed in the "collective regulator" cases, in which the Court consistently stated that parties not established under public law, who regulate conduct within the market, are bound by free movement obligations. The Court's reasoning in *Walrave*, in which a

[189] Joined Cases C-152/07 and C-154/07 *Arcor a.o. v Germany* [2008] EU:C:2008:426, para.36
[190] The free movement of workers, services, establishment, and most recently, goods have all been held to have some degree of horizontal direct effect: Case C-281/98 *Angonese* [2000] EU:C:2000:296; Case C-341/05 *Laval*, n.25; Case C-438/05 *Viking*, n.22; Case C-171/11 *Fra.Bo v DVGW* [2012] EU:C:2012:453, respectively.

cyclists' union was subject to Articles 45 and 56 TFEU,[191] arguably demonstrates that this is logical in light of the economic goals of the Union. It remarked that 'the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations…which do not come under public law'.[192] Moreover, variations in Member State approaches for regulating work, some grounded in public law, others in private regulation, could result in inequality in the application of the relevant free movement rules.[193]

Nevertheless, this very evolution makes a distinctive contribution to the further subjugation of fundamental rights to the free movement provisions by opening the door to further interaction between these norms, and extending the two-stage approach to actions taken by formally private institutions. While private actors, as collective regulators, might pursue activity largely similar to directly discriminatory domestic laws – such as an employment policy stipulating the recruitment of only national workers – the collective regulator case-law creates potential for the extension of the free movement provisions to private individuals acting in a purely private capacity. This could include the exercise of their fundamental rights. Indeed, in *Bosman*, the potentially limiting effects on private exercise of fundamental rights were explicitly cited as a reason not to apply Article 45 TFEU, on workers, to private parties.[194] However, while the CJEU acknowledged that free movement is more likely to interact with fundamental rights where it is directly effective horizontally, it determined, on the facts, that this would not be inappropriate in the given case, since the collective regulator's rules were not necessary to enjoy the fundamental right to freedom of association.[195] Within the factual confines of *Bosman*, where the fundamental rights issue was tangential, this approach seems reasonable. However, it becomes problematic if *Bosman*, and the collective regulator case-law more broadly, is used as *general* authority for the horizontal application of Article 45 to private actors, since this would inhibit future consideration, in different factual situations, of whether the horizontal application of free movement is inappropriate in light of the private exercise of fundamental rights.

Nonetheless, *Walrave* and *Bosman* have been consistently cited as general authority for the application of free movement obligations to other private bodies, pursuing activities

[191] Case 36/74 *Walrave*, n.80, para.17. See also Joined Cases 266 and 267/87 *R v Royal Pharmaceutical Society of Great Britain* [1989] EU:C:1989:205; Case C-176/96 *Lehtonen and Castors Braine* [2000] EU:C:2000:201
[192] Ibid, para.18
[193] Para.19
[194] Case C-415/93 *Bosman.* [1995] EU:C:1995:463
[195] Para.80

unconnected to market regulation, and/or exercising their fundamental rights. Thus, in *Angonese,*[196] the Court relied on those judgments to apply Article 45 TFEU to a private bank, which required employees to have a certificate of bilingualism obtained in the Italian region of Bolzano.[197] The outcome of the case is understandable, on the one hand, since the rule, being indirectly discriminatory in nature, clearly imposed obstacles to the cross-border movement of workers. Yet, on the other, the judgment, nevertheless, represents a generalisation of the principle in *Walrave*. Indeed, it has been described, by Dashwood, as 'distinctly odd' since the employer in *Angonese* could not be described as an association collectively regulating employment in the Italian banking sector.[198] In fact, the bank, acting individually, simply sought a method of ensuring that its employees were proficient in both languages of the region.

Similarly, and more significantly for our purposes, the Court, in its *Viking* and *Laval* decisions, cited *Walrave* and *Bosman*, amongst other collective regulator cases,[199] as authority for the extension of the direct effect of Articles 49 and 56 TFEU, respectively, to trade unions who had been exercising their fundamental right to strike.[200] This is problematic for two interconnected reasons: 1) the Court's focus on the capacity of trade unions to regulate the market[201] fails explicitly to appreciate that trade unions use methods for rule formulation that utilise and impact on fundamental rights; 2) this authority ignores the separate representative task of trade unions, which was not the function of the other private regulatory organisations in the *Walrave* line of case-law.

In *Viking*, the Court repeated its *Walrave* mantra that the abolition of obstacles to free movement would be compromised if barriers created by bodies not governed by public law were not eliminated.[202] The Court noted that 'in exercising their autonomous power...trade unions participate in the drawing up of agreements seeking to regulate paid work collectively'.[203] In this passage, the Court seems to consider the ability to regulate collectively of key significance. However, both *Viking* and *Laval* distinguish themselves from *Walrave et*

[196] Case C-281/98 *Angonese,* n.190
[197] Paras.31-32
[198] A. Dashwood, 'Viking and Laval: Issues of Horizontal Direct Effect', (2007-2008) CYELS 525, 529
[199] Case 13/76 *Donà* [1976] EU:C:1976:115; Joined Cases C-51/96 and C-191/97 *Deliège* [2000] EU:C:2000:199; Case C-309/99 *Wouters* [2002] EU:C:2002:98
[200] Case C-438/05 *Viking*, n.22, para.33; Case C-341/05 *Laval*, n.25, para.98
[201] *Viking*, para.64; *Laval*, para.99
[202] *Viking*, paras.33, 34 and 57
[203] *Viking*, paras.64-65

al because, although trade unions participate in market regulation, this is by virtue of their representative function. As Davies notes, 'professional bodies are given exclusive control over a particular area of economic activity, whereas unions are (in general) given the right to take collective action in support of their negotiating activities'.[204] By shoe-horning trade unions into the existing *Walrave* framework, which concerns *exclusive* control of regulation, the involvement of fundamental rights in unions' regulatory function as a result of the generally weaker economic position of workers, is somewhat underappreciated in the Court's reasoning. Moreover, the fact that a trade union formulates rules through negotiation and, where necessary, by means of the exercise of the fundamental rights to strike, rather than through exclusive control, could significantly alter the meaning of questions such as 'was the action taken by the party in breach proportionate?'.[205]

As well as overlooking the methodology of unions' regulatory function, the reliance on *Walrave* neglects the purely representative capacity of trade unions. The extension of horizontal effect to trade unions puts this role, and its related fundamental rights, at risk. As emphasised above, the *Walrave* case-law concerns collective regulators with exclusive control for laying down rules and imposing sanctions in relation to a regulatory field. Accordingly, it offers authority for the application of Articles 56 and 45 TFEU to bodies solely concerned with regulating an area of activity,[206] and not with performing a representative function that is often linked to, but can be entirely separate from, their regulatory role. Consequently, the extension of horizontal direct effect to trade unions in *Viking* and *Laval* arguably underappreciates the crucial part played by trade unions in securing the fundamental right of workers to fair and just working conditions,[207] to information and consultation in respect of the employer undertaking,[208] broader rights to collective action,[209] and protection in the event of unfair dismissal.[210] Significantly, it also puts trade unions' abilities to organise 'political strikes' at risk where this impedes cross-border activity. This is exacerbated by the

[204] A. Davies, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ', (2008) 37(2) ILJ 126, 136

[205] For instance, collective action relies on pushing the employer to the point where she/he will consider the trade union's terms. See T. Novitz, 'A Human Rights Analysis of the *Viking* and *Laval* Judgments' (2007–2008) 10 CYELS 541

[206] Although the Court in *Viking* also relied on *Angonese* (para.33), which is not a collective regulator case. However, this analysis has already questioned the use of *Walrave* and *Bosman* to support the decision in *Angonese*. Moreover, *Angonese* concerns the horizontal application of Article 45 TFEU to the employer who is arguably in some position to impose employment rules unilaterally.

[207] Art.31 CFR

[208] Art.27.CFR

[209] Art.28 CFR

[210] Art.30 CFR

imbalanced nature of the breach/justification model since, as demonstrated by *Viking*, collective action in relation to cross-border outsourcing will only be justifiable where *current* jobs are 'jeopardised or under serious threat'.[211] As Weatherill remarks, this excludes the possibility of 'more long-term strategic action by unions and even the 'political strike' in so far as it impedes cross-border movement. That constitutes a dramatic incursion into the permitted scope of collective labour rights'.[212]

The Court did attempt to bolster its reasoning in *Viking* by stating that trade unions are not (only) subject to Article 49 TFEU as collective regulators but also simply because private parties are capable of restricting free movement. It used the cases of *Schmidberger* and *Spanish Strawberries* to illustrate this point.[213] Accordingly, the notion that horizontal direct effect is restricted to bodies exercising a quasi-public or legislative function was rejected.[214] The Court's reliance on *Schmidberger* and *Spanish Strawberries* is open to challenge. As Dashwood notes, 'it is inaccurate to claim that those decisions "rely fundamentally on the reasoning that private parties can jeopardise the objectives of the provisions on freedom of movement"'.[215] Rather, the actions of private parties merely form the factual background to the separate issue that public inaction can impede free movement.[216] Yet, in *Viking*, we see this used to justify the extension of direct effect to those private parties who exercise fundamental rights. Indeed, in contrast to *Bosman*, in which the Court seemed to accept the argument, in principle, that the exercise of fundamental rights might prevent the direct application of free movement rules to private parties, in *Viking*, the very existence of restrictive effects on free movement by the exercise of fundamental rights is seemingly provided as a reason to apply Article 49 TFEU directly to private parties.

Crucially, this alters the dynamic between free movement and fundamental rights in a number of ways. First, the frequency and types of interaction between these norms increase, introducing structural imbalance into a new free movement/fundamental right interface.

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[211] Case C-438/05 *Viking*, n.22, para.81
[212] S. Weatherill, '*Whose* internal market? Companies' or Workers', Judges' or Politicians'', (2011) 24(1) EUSA Review 2, 3
[213] Case C-438/05 *Viking*, n.22, para.62, citing Case C-112/00 *Schmidberger*, n.6 and Case C-265/95 *Commission v France (Spanish Strawberries)* [1997] EU:C:1997:595
[214] *Viking*, paras.62-64. See also D. Wyatt, 'Horizontal Effect of Fundamental Freedoms and the Right to Equality After Viking and Mangold, and the Implications for Community Competence', (2008) 4 CYELP 1, 8
[215] Dashwood, n. 198, 532 quoting the Opinion of AG Poiares Maduro in *Viking* (n.99), para.38. See also C. Barnard, '*Viking* and *Laval*: An Introduction' (2007-2008) CYELS 463, 470-474
[216] Ibid

Specifically, in *Schmidberger*, actions were limited to claims against the inaction of the Member State, whereas in *Viking* and *Laval*, this was extended to the activities of private actors. The nature of the conflict is also altered since the question in *Schmidberger* was whether a public authority had appropriately managed the relationship between two rights-holders: the logistics company wishing to exercise free movement rights, and the demonstrators exercising their fundamental rights to freedom of expression and association. By contrast, the extension of the applicability of Articles 49 and 56 TFEU directly to private actors, in *Viking* and *Laval*, leads to a qualitatively very different question: in exercising its *own* fundamental rights, has the private party ensured that its actions will not unduly restrict the free movement rights of others? This is not an obligation, placed on a public body, to weigh two competing interests, but a requirement that a private actor monitor her/his own exercise of fundamental rights to ensure that it does not interfere disproportionately with free movement. Further, since the two-stage breach/justification methodology is maintained in instances of horizontal direct effect, there is no obligation on the holders of free movement rights to consider the proportionality of free movement on the fundamental rights of the other private party.

This approach is particularly unsuitable in *Laval* when we consider that, during collective action, social partners are effectively in opposition and that the whole point of strikes is to drive the employer to the point where they are willing to consider the trade union's terms. Yet, as a result of the horizontal applicability of Articles 49 and 56 TFEU, trade unions are required to take into consideration not only the interests of their members but also the interests of those they are acting against.[217] More broadly, Spaventa speculates as to the impact of the Court's reliance on *Schmidberger* and *Spanish Strawberries* on the fundamental rights of private parties having no regulatory role whatsoever. She asks if, for instance, a human rights group that organises a boycott against products coming from a Member State, which has attracted criticism for a political situation, is potentially liable for the restrictive effects of that boycott on Article 34 TFEU.[218] Of course, there are situations in which a citizen will be expected to keep the exercise of her/his own fundamental rights in check. For instance, journalists are required to ensure that their exercise of the freedom of expression

[217] S. Giubboni, unpublished paper presented at the Modern Law Review Workshop 'Developing Solidarity in the EU: Citizenship, Governance, and New Constitutional Paradigms' University of Sussex, 05/05/08, cited by E. Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', in Currie, Dougan, n.97, ch.14, 358; Novitz, n.205, 560-561
[218] Ibid, 362

does not unduly interfere with the right to privacy. However, since fundamental rights are not generally horizontally effective, this is achieved by reference to rules developed through an objective balancing of various public interests during the process of law-making, or via the measures of collective regulators. Thus, in *Spanish Strawberries*,[219] the demonstrators could regulate their direct action by reference to the criminal law, which would prohibit violent conduct or the destruction of property, whilst the State was in breach of free movement law for failing to enforce it. By contrast, post-*Laval*, trade unions are expected to intuit, objectively, when their actions go too far, even when they are acting in compliance with domestic law.

Second, the application of free movement to a private party in *Viking* and *Laval*, rather than the State as in *Schmidberger*, seemingly results in a more rigorous justification assessment by the Court. Specifically, the Court in both *Viking* and *Laval* examined the legitimacy of the *aim* behind the exercise of the fundamental right to strike, where it had held in *Schmidberger* that this was not relevant to the question of justification. This is seemingly a direct consequence of the application of the free movement provisions to a private party rather than the State. In *Schmidberger*, the Court focused purely on the question of whether the Member State had done enough to ensure that the freedom of goods was not unduly restricted by the exercise of fundamental rights, since the aim behind the protest related to the actions of the protestors themselves.[220] By contrast, Advocate General Mengozzi, in his Opinion in *Laval*, explicitly distinguishes *Schmidberger* on the basis that 'the aims pursued by the collective action taken by the defendant in the main proceedings are…decisive in the context of a dispute in which only private persons are parties'.[221] This was echoed by the Court, which not only scrutinised the existence of the fundamental right to strike but also whether its exercise pursued a legitimate objective. As previously discussed, although worker protection was a legitimate aim in *Viking* and *Laval*, this approach might pose a threat to the political expression of trade unions. This risk is potentially increased by the Court's combined use of *Schmidberger/Spanish Strawberries* with the *Walrave* case-law, since *Walrave* arguably side-lines the purely representative function of trade unions and calls into question whether purely political activities will be legitimate where these impede free movement. The potential

[219] Case C-265/95 *Commission v France*, n.213
[220] Case C-112/00 *Schmidberger*, n.6, paras.66-68. C. Brown argues against this approach, noting that, under the ECHR, political speech is hierarchically superior to commercial or artistic expression, in 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.', (2003) 40 CMLRev 1499, 1504-1505
[221] Case C-341/05 *Laval*, EU:C:2007:291 (Opinion), para.244

liabilities arising from the British Jobs for British Workers strike action at the Lindsey Oil Refinery are pertinent here.[222] In combination with the possibility of unlimited damages liability, the uncertainty around which objectives will legitimise collective action has the potential to discourage trade unions from exercising their representative function.[223] This is simply not an issue in relation to *Schmidberger* actions against Member States, where aim is not relevant.

Even the legitimacy of worker protection was limited, in *Viking*, to the safeguarding of jobs that were at 'serious risk'.[224] Accordingly, we see a distinctive architectural imbalance faced by private actors under the two-stage process, through the introduction of an additional evidentiary hurdle. The requirement that private parties demonstrate not only that they are exercising a fundamental right but also that the reasons behind it conform to an overriding reason of the public interest can be viewed as doubling the derogation requirement, since it is normally sufficient to provide one permissible justification, where here it is necessary to present two. Alternatively, existence of the exercise of the fundamental right to strike in *Viking* and *Laval* is effectively bypassed, with judicial focus centring on worker protection as a public interest.[225] Moreover, even if objectives are found to be legitimate, the exercise of fundamental rights must still be appropriate and necessary in relation to that goal. Thus, in *Viking*, even where jobs were in jeopardy, trade unions had to exhaust collective measures that were less restrictive of free movement before taking strike action.[226] In *Laval*, industrial action with the goal of worker protection could only be justified where it sought to apply the terms and conditions referred to in the core nucleus of the PWD.[227]

Third, the reliance on *Schmidberger* to extend direct effect to private parties increases structural imbalance because the rationale for this expansion – that the exercise of fundamental rights is capable of restricting free movement – is also the very activity that private parties must rely on to justify their consequent breach of EU law. Yet, this reasoning

[222] http://news.bbc.co.uk/1/hi/uk/7859968.stm, last accessed 07/01/15. Existing jobs were not directly in jeopardy here and the employer claimed that posted workers were being paid the same as domestic employees.
[223] By contrast, Dashwood contemplates whether the particular role of Swedish trade unions in regulating labour offers the 'forlorn hope' of an escape route for British trade unions from the implications of *Viking* and Laval, n.198, 535
[224] Case C-438/05 *Viking*, n.22, para.81
[225] V. Trstenjak, E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU', (2013) ELRev 293, 313
[226] Case C-438/05 *Viking*, n.22, para.87
[227] Case C-341/05 *Laval*, n.25, paras.108

inherently perceives the exercise of fundamental rights as a wrongful act in need of control. Thus, in *Viking* and *Laval*, exercise of the fundamental right to strike was both the trade unions' reason for restricting free movement and the rationale for applying Articles 49 and 56 TFEU to private actors in the first place. Moreover, this reasoning creates the possibility that, for instance, in a future action factually similar to *Schmidberger*, Article 34 TFEU could be applied to the demonstrators themselves *because* their exercise of the fundamental right to freedom of expression can have a restrictive impact on the free movement of goods. Yet, this fundamental right would also be the justification for the protestors' actions. This is markedly different from *Schmidberger* itself, in which the decision of a public body not to prevent a demonstration was in breach of free movement but its justification lay in the exercise of fundamental rights by private individuals. Accordingly, it was the process of this decision-making that was subject to questions of proportionality, not the decision to exercise fundamental rights in and of itself.

Fourth, the Treaty provisions are not necessarily designed with private parties in mind, putting them at a disadvantage when individuals come to rely on Treaty derogations to justify their breach of free movement. Thus, Dashwood argues that the *a fortiori* point that the free movement provisions should be afforded direct effect because private parties are able to present barriers to free movement is 'unconvincing'.[228] Specifically, he posits that while such an approach would be viable in relation to Treaty articles targeted at addressing mischief that can be both caused and cured entirely by private hands,[229] this is not true for the market freedoms.[230] For Dashwood, the free movement provisions are chiefly directed at 'mischief' created by a public power.[231] Indeed, the horizontal direct effect of the relevant free movement provisions would appear to be the result of a purposive, rather than textual, interpretation of the Treaty. In *Viking*, the Court explicitly recognised that 'certain provisions of the Treaty are formally addressed to the Member States',[232] but nevertheless extended the reach of Article 49 TFEU in light of the potential for private individual to restrict cross-border

[228] Dashwood, n.198, 530, in reference to Case C-281/98 *Angonese*, n.190
[229] E.g. Art.157 TFEU on equal pay for men and women; Case 43/75 *Defrenne*, n.89
[230] N.198, 530
[231] N.198, 530
[232] Case C-438/05 *Viking*, n.22, para.58. Likewise, Art.34 TFEU formally refers to the prohibition *between* Member States of quantitative restrictions and MEQRs, yet this was recently extended beyond the state in Case C-171/11, *Fra.Bo*, n.190. Similarly, regarding Art.45(3) TFEU, only public authorities really have the power to limit entry to and movement within the territory of a Member State, or place restrictions on residence and length of stay. However, Wyatt argues that the free provisions are nevertheless not targeted at the Member States alone, n.219, 5

establishment. Accordingly, Treaty derogations from free movement are also likely to be designed to cater for the legitimate needs of *public* bodies. This would automatically increase the structural disadvantage faced by private undertakings, already on the procedural back-foot, when they seek to defend their *prima facie* wrongful breach of free movement rules at the justification phase of the two-stage framework. As De Witte asks, why should private undertakings be exposed to an obligation to respect free movement rights 'when the legitimate reasons that can justify restrictions to trade…are entirely framed in terms of *public* interest and therefore leave private parties empty handed in trying to justify their behaviour'.[233]

In short, in the admittedly limited instances of *direct* discrimination, a purely private party may find it difficult to justify that its actions were in the interests of *public* policy, *public* security or *public* health, as required, for instance, by Article 52(1) TFEU, which dictates the circumstances in which limitations on the freedoms of services and establishment might be permitted. This will be particularly relevant where private undertakings do not act as collective regulators – who in performing functions similar to those of the State might rely on justificatory options similar to those of public actors – but instead carry out important representative functions by means of exercising fundamental rights.

Of course, many free movement cases concern non-discriminatory activity, for which justifications may be drawn from the mandatory requirements.[234] Broader than the Treaty derogations, non-exhaustive and unwritten, these principles seem less open to criticism for being ill-suited for use by private parties. However, in some instances, the contributions that direct effect has made to a structural favouring of free movement can themselves restrict the utilisation of mandatory requirements by private actors. This is illustrated by examining the Court's assessment of worker protection as a justification for the exercise of the right to strike in *Laval*.

It will be recalled that, in *Laval*, the Court held that the trade unions' strike action was not proportionate since those unions sought a level of protection going above and beyond the core nucleus of terms and conditions referred to in Article 3(1)(a)-(g) of the Posted Workers Directive. Significantly, although Article 3(10) PWD permitted the application of terms and conditions not referred to in Article 3(1)(a)-(g) for reasons of public policy, as a private actor,

[233] De Witte, n.4, 334
[234] Case 120/78 *'Cassis de Dijon'*, n.16

a trade union was not entitled to make decisions or impose restrictions in the public interest.[235]

This reveals an inconsistent approach in the reasoning of the Court when viewed as a whole. The CJEU's reliance on the collective regulator case-law to support the application of Article 56 TFEU to trade unions must be rooted in the perception of trade unions as the equivalent of public actors when performing their regulatory function. This is emphasised by the Court's statement, in *Walrave*, that 'since…working conditions in the various Member States are governed sometimes by provisions laid down by law or regulation and sometimes by…acts adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in application'.[236] And yet, at the justification stage, a public policy derogation to extend the overriding requirement of worker protection, in the context of posting, may only be utilised by *de jure* public actors.[237] Trade unions, now viewed as *private* actors, may not rely on public policy to defend their *prima facie* wrongful exercise of the fundamental right to strike. Since terms and conditions beyond the core nucleus may be applied for reasons of public policy in Member States that regulate labour through legislation, rather than social partners, this outcome could lead to the very inequality in application that *Walrave* claims to tackle.[238] Accordingly, despite the Court's statement in *Bosman*, that 'there is nothing to preclude individuals from relying on justifications on grounds of public policy, public security, or public health', these are, in certain situations, unavailable to private parties.[239]

Consequently, the procedural disadvantage facing fundamental rights, when they are presented by the two-stage model as *prima facie* unlawful restrictions on free movement, can be even greater in instances of the exercise of fundamental rights by private individuals. Horizontal direct effect simultaneously makes it possible to bring actions against private parties for exercising their fundamental rights while restricting the opportunity to defend these rights. Admittedly, *Laval*, and the interpretation of the PWD, is a very particular example in this regard. Nevertheless, it introduces broader questions about *who* the Court will consider

[235] Case C-341/05 *Laval*, n.25, para.84
[236] Case 36/74 *Walrave*, n.80,para.19
[237] The subsequent evidentiary burden on public actors, to demonstrate a 'genuine and sufficiently serious threat to a fundamental interest of society' is nevertheless high, Case C-319/06 *Commission v Luxembourg*, n.21, para.50
[238] Ibid.
[239] See also Wyatt, n.214, 29-30

capable of, for instance, implementing the mandatory requirements of environmental or consumer protection in future cases.

5. Conclusion

This chapter has argued that the doctrine of direct effect has made both indirect and distinctive contributions to the creation of an imbalanced architecture for the adjudication of conflicts between free movement and fundamental rights. It has posited that the influence of the *Van Gend* criteria during the process of conferring direct effect status on the free movement provisions has encouraged a perception of them as unconditional and precise. Consequently, Articles 36, 45(3), 52(1) and 65(1) are viewed as *derogations* from free movement rights to be interpreted restrictively, rather than as conditions for their exercise. This reinforced the need for a two-stage breach/justification process, which is problematic when free movement interacts with fundamental rights. The reading of the market freedoms as 'precise' limited the capacity of secondary legislation to incorporate fundamental rights considerations into the *definition* of originally programmatic free movement provisions, instead relegating them to the position of opposing derogations from precisely defined and unconditional economic freedoms. Direct effect has also strengthened the presentation of the market freedoms as individual rights. This has increased the frequency of interactions between free movement and fundamental rights as individuals have demonstrated new ways by which free movement can be restricted. It has also contributed to the conflation of free movement as an individual right with its role as a fundamental principle of the internal market, lending linguistic substance to the procedural prioritisation of free movement generally. By requiring the immediate setting aside of fundamental rights measures, which conflict with free movement, and by making it possible to bring damages actions against private parties for exercising their fundamental rights, the principles of primacy and effective judicial protection have aggravated the structural subjugation of fundamental rights to the free movement provisions. The extension of direct effect to new actors – i.e. from public to private – has increased the frequency of interactions between free movement and fundamental rights. Moreover, the nature of those conflicts has changed since private actors are obliged to provide a legitimate aim behind their exercise of a fundamental right and, at times, rely on justificatory options ill-suited to the private exercise of fundamental rights. In short, direct

effect has had a significant and multifaceted impact on the procedural prioritisation of free movement over fundamental rights.

*Chapter Four**

UNION CITIZENSHIP: FUNDAMENTALISING FREE MOVEMENT AND EXACERBATING STRUCTURAL IMBALANCE?

1. Introduction

Article 20 TFEU bestows upon *every* person, holding the nationality of a Member State, citizenship of the Union. Pursuant to Article 21 TFEU, Union citizens enjoy rights including: freedom of movement and residence within the territory of the Union; the right to vote and stand as a candidate in municipal and European parliamentary elections in the Member State of residence on the same basis as nationals; access to protection by the diplomatic and consular authorities of any Member State in a third country where the citizen's Member State of nationality is not represented; and the right to petition the European Parliament, to apply to the European Ombudsman, and to address Union institutions and advisory bodies in any of the Treaty languages and receive a reply in the same language. Putting aside the omission to include third country nationals within these provisions,[1] Union citizenship would accordingly appear to be rights-*enhancing*. In particular, the availability of a right to intra-EU movement for *all* citizens, attached to their personal rather than economic status, has facilitated access to fundamental social rights by economically inactive Union citizens residing in host Member States.[2] Nevertheless, borne from the existing concept of *market* citizenship, formal Union citizenship was introduced, at Maastricht, into a climate of scepticism.[3] In particular, criticism has principally focused on the still pertinent question of whether Union citizenship goes *far enough* in recognising the fundamental rights of economically inactive individuals when it

* A version of this chapter, entitled 'Union Citizenship: Placing Limitations on a Human-Centred Approach', is included in N. Ferreira, D. Kostakopoulou (eds), *The Human Face of the European Union: Is EU Law and Policy Humane Enough?*, (CUP, forthcoming).

[1] J. Shaw, 'Citizenship of the Union: Towards Post-national Membership', (1997) Jean Monnet Working Paper No.6, www.jeanmonnetprogram.org last accessed 09/01/15; S. Peers, 'Towards Equality: Actual and Potential Rights of Third Country Nationals in the European Union' (1996) 33 CMLRev 7

[2] Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] EU:C:1998:217; Case C-184/99 *Grzelczyk v CPAS* [2001] EU:C:2001:458; Case C-138/02 *Collins v SSWP* [2004] EU:C:2004:172

[3] C. Closa, 'The Concept of Citizenship in the Treaty on European Union' (1992) 29(6) CMLRev 1137; H. D'Oliveira, 'Union Citizenship: Pie in the Sky?', in A. Rosas, E. Antola (eds), *A Citizen's Europe,* (Sage, 1995), 126, 141 and 147. D. Kostakopoulou explores the reasons behind this initial scepticism in 'European Union Citizenship: Writing the Future', (2007) 13(5) ELJ 623, 624-625. See also M. Elsmore, P. Starup, 'Union Citizenship – Background, Jurisprudence and Perspective: The Past, Present and Future of Law and Policy, (2007) 36(1) YBEL 57, 58

still vests largely in movement,[4] and when the right to move is still essentially subject to limitations and conditions associated with economic activity or economic self-sufficiency.[5]

By contrast, but still focusing on its market origins, this chapter will argue that there is a paradox inherent in pursuing fundamental rights protection through the concept of EU citizenship. Specifically, the chapter will posit that, by adopting free movement as its core right and attaching it to the personal status of the individual citizen, Union citizenship has elevated free movement to a fundamental right. This lends legitimacy to, and emphasises the need for, an adjudicative framework, such as the two-stage breach/justification model, that favours free movement over conflicting law and policy. Within the confines of citizenship, where free movement generally runs *congruent* to fundamental rights this can be viewed as enhancing the fundamental rights of Union citizens, particularly in the field of fundamental social rights.[6] However, a deeper analysis demonstrates that this enriched fundamental rights protection is only possible as a *corollary* of the structural boost that Union citizenship offers to free movement. Consequently, citizenship's reinforcement of the two-stage approach contains the potential indirectly to subject fundamental rights to a strengthened free movement bias where the former *clashes* with the latter, placing fundamental rights at further structural disadvantage. Although this is more likely to occur in the domain of *economic* free movement, since Union citizenship was built upon the existing structures of the internal market any enhanced preference for free movement within Union citizenship is likely to cross-pollinate, via this shared architecture, into the economic sphere. Moreover, Union citizenship has, in any case, directly contributed to the increased frequency of interaction between the market freedoms and fundamental rights. Specifically, by attaching free movement to the rights of individual citizens, citizenship offers reasons to broaden the 'breachability' of the free movement provisions. In some cases, this has resulted in the presentation of fundamental social rights as potential restrictions of EU law. Moreover, since breaches of free movement now also constitute interference with the rights of Union citizens,

[4] A. Tryfonidou, 'Reverse Discrimination in Purely Internal Situations: An Incongruity in a Citizens' Europe', (2008) 35 IEI 43; N. Nic Shuibhne, 'Free Movement of Persons and the Wholly Internal Rule: Time to Move On?', (2002) CMLRev 731

[5] C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union', (2013) 50 CMLRev 1643; M. Everson, 'The Legacy of the Market Citizen', in J. Shaw, G. More (eds), *New Legal Dynamics of European Union*, (OUP, 1995), 73; D. Kochenov, 'Ius Tractum of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights', (2009) 15 CJEL 169. Within the case-law, see most recently, Case C-333/13 *Dano* [2014] EU:C:2014:2358

[6] N.2. See, however, O'Brien, ibid, who argues that Union citizenship, and its focus on free movement, has infused economic activity with a 'moral glow' to the detriment of crucial non-economic societal roles.

Union citizenship encourages an increase in the evidentiary hurdles faced at the justification stage.

The chapter unpacks this argument by first outlining, in section two, the market origins of Union citizenship. The section serves as an important reminder that formalised Union citizenship emerged from a *market* citizenship, which sought, principally, to recognise the human needs of the economic actor. As a result, a formal EU citizenship has adopted free movement as its core right and utilised the basic legal structures of the internal market to provide it. This historical backdrop is critical since it displays the enmeshed nature of citizenship and economic free movement and, therefore, the possibility for developments taking place within one to cross-pollinate into the other.

Section three will highlight that, by attaching free movement to the personal status of Union citizens, EU citizenship has personalised and fundamentalised free movement, presenting it as a fundamental right. This supports the use of an adjudicative architecture weighted towards supporting free movement. Moreover, since free movement straddles both the personal and economic spheres, this fundamentalisation of free movement is likely to seep into the market freedoms.

Section four analyses the potential consequences, from a fundamental rights perspective, of Union citizenship's reinforcement of the two-stage breach/justification methodology. It postulates, first, that the fundamentalisation of free movement has altered its 'breachability' by domestic policy in the field of fundamental social rights. In particular, citizenship has created new situations in which complex programmes of social protection can be challenged as barriers to the exercise of free movement by individual Union citizens. The section argues, second, that by increasing the constitutional significance of a breach of free movement, Union citizenship has raised the evidential bar at the justification stage, arguably reducing further the opportunity for opposing fundamental rights to overcome the procedural disadvantage they face under the two-stage framework. Accordingly, the section considers Union citizenship as the third contributor within our constitutional trinity, alongside the constitutional developments discussed in chapters two and three, to the structural subjugation of fundamental rights to the market freedoms.

Having explained the capacity of Union citizenship to have limiting effects, in some instances, on Member States' abilities to design workable systems for safeguarding fundamental social rights, section five re-frames the discussion in terms of the challenges currently facing Union citizenship. It advances that EU citizenship is at a cross-roads: it must either evolve so as to cater better, at the supranational level, for those fundamental rights that clash with free movement, or it must at least ensure that it does not operate to undermine fundamental rights protection offered at the domestic level. In this way, Union citizenship presents itself as a case-study for a wider constitutional issue remarked upon in chapter one. As a polity built on conferred powers, having diverse and, at times, conflicting contemporary objectives, with varying levels of legislative competence to achieve them, the Union must either offer supranational solutions to the negative aspects of deregulation caused by free movement, or the Court should adapt its adjudicative methodology to allow the Member States sufficient room to pursue legitimate aims outside of the shadow of a breach of free movement.[7]

2. Union citizenship: borne from, and built upon, the internal market

This section will demonstrate the historical and structural links between the internal market and Union citizenship and therefore the potential for seepage between the two. This is crucial to our understanding of how any fundamentalisation of free movement within citizenship might operate also to reinforce a structural advantage for economic free movement over fundamental rights. The section will first document the emergence of an incipient form of market citizenship as part of the judicial and legislative recognition that, in order to form an effective internal market, it would be necessary to meet the human needs of the economic actor, who might otherwise be disinclined to participate in free movement. The section will outline, second, that the result of this historical progression is that when Union citizenship was formalised in the Maastricht Treaty, the right to move and reside freely between the Member States was not only central to the rights associated with it but was also built upon existing internal market frameworks.

[7] Ch.1, s.4.3.2.1

2.1. An incipient form of Union citizenship: recognising the human needs of the economic actor

It will be recalled from chapter one that the creation of a European *Economic* Community followed unsuccessful attempts, focused on political and defensive union, to secure a more integrated Europe in the aftermath of the Second World War.[8] This is reflected in the preamble to the Rome Treaty, which states that its signatories are 'determined to lay the foundations of an ever-closer union among the peoples of Europe'. Nevertheless, the Rome Treaty clearly pursued integration via an economic framework. Accordingly, Article 2 EEC made explicit that the central task of the then-Community was the achievement of the common market. Although a social purpose was also visible in the Rome Treaty – for instance, its preamble speaks of the need to ensure social progress in the Member States – Article 2 EEC presents this as achievable through the medium of the common market. Moreover, as chapter three documented, the social provisions in the Rome Treaty, such as the principle of equal pay between men and women and the maintenance of paid holiday schemes, while serving important social functions, were principally inspired by the need to avoid distortions in competition.[9] In short, the attainment of social goals was pursued by making provision for the needs of *workers*, enjoyed through their status as *economic* actors, and framed, initially at least, in terms of the negative impact, on economic integration, of ignoring the fact that workers are also human beings. Thus, regardless of whether the Rome Treaty can be said to have contained social as well as economic aims these would chiefly be shaped by, and built upon, the narrow economic foundations and legal structures of the internal market.

For instance, several provisions of the Rome Treaty sought to improve the employment opportunities, working conditions, and standards of living of Union workers.[10] Since free movement was the cornerstone of the common market, both the Union legislature and the judiciary endeavoured, almost from free movement's inception, to ensure that certain human needs were met. For instance, Regulation 1612/68 (now repealed) – concerning the freedom of movement of workers within the then-Community – provided that Union workers 'should

[8] In 1954, the French National Assembly refused to ratify the Treaty establishing the European Defence Community. See E. Furdson, 'The European Defence Community: A History', (Macmillan, 1980); J. Pinder, 'The Building of European Union', (OUP, 1998)
[9] Arts.119-120 EEC; ch.3, s.2.2.
[10] See Part Three, Title III EEC, in particular Chapters 1 and 2, concerning social policy and the European social fund.

enjoy the same social and tax advantages as national workers'.[11] The Court of Justice interpreted this provision widely, holding that it applied not only to social and tax advantages attached to worker status but also to benefits payable by virtue of residence on Member State territory.[12] Regulation 1612/68, and later Directive 2004/38,[13] also permitted Union workers to bring certain family members with them to the host State,[14] and made provision for the children of Union workers to have access to State education.[15] In relation to primary law, in *O'Flynn,* the Court recognised the family links that migrant workers generally maintain with their State of origin, finding UK rules restricting financial support for funerals to those taking place in the UK to be, therefore, in breach of Article 45 TFEU, on free movement of workers.[16] Indeed, the Union judiciary has long acknowledged the general importance of treating the worker as a human being.[17]

Nevertheless, although these legislative and judicial developments might well represent genuine attempts to secure important rights for workers – such as the fundamental right to family life or fundamental social rights – this could only be processed as a corollary of doing what '[s]eemed suitable to facilitate the mobility' of Union workers,[18] and was accordingly secured via the framework of *economic* integration. Clearly, the chance of a Union worker moving from one Member State to another, in order to work, would be significantly reduced if restricted access to social, tax, or pension benefits left her/him 'worse off' after exercising free movement rights; or if moving to another Member State created legal or practical obstacles to family life. Through addressing these practical issues, free movement could become a more effective mechanism for the internal market, and therefore, for economic integration.

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[11] Arts.7(2) and 9, Regulation 1612/68 of the Council of 15th October 1968 on Freedom of Movement of Workers within the Community (OJ 1968 L257/2)

[12] Case 32/75 *Cristini v SNCF* [1975] EU:C:1975:120; Case 207/78 *Ministère public v Even* [1979] EU:C:1979:144

[13] Directive 2004/38 of the European Parliament and of the Council on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2004 L158/77)

[14] Arts.10-12 Regulation 1612/68; Arts.6(2) and 7(2) Directive 2004/38

[15] Art.12 Regulation 1612/68, which remained in place after the amendments introduced by Directive 2004/38. The substance of Art.12 of Regulation 1612/68 is maintained by Art.10 Regulation 492/2011 of the European Parliament and of the Council of 5th April 2011 on freedom of movement for workers (codification) (OJ 2011 L141/1)

[16] Case C-237/94 *O'Flynn* [1996] EU:C:1996:206, although this case post-dates the introduction of Union citizenship, it nevertheless provides a useful example of the Court's understanding of the utility of recognising the human needs of workers for the facilitation of economic integration.

[17] E.g. AG Trabucchi stated in Case 7/75 *Mr and Mrs F v Belgian State* [1975] EU:C:1975:75 that 'the migrant worker is not to be regarded by Community law…as a mere source of labour but is viewed as a human being', para.5

[18] Case 207/78 *Even*, n.12, para.22

And yet, as early as 1961, the Commission recognised free movement as '*le premier aspect d'une citoyenneté européenne*'.[19] The preamble to Regulation 1612/68 also viewed free movement as 'a fundamental right of workers…and a means by which the worker is guaranteed the possibility of…promoting his social advancement'.[20] Thus, free movement quickly emerged as more than just a tool for the creation of the internal market. It presented a means by which integration might be achieved *beyond* the economic; a route to an 'ever-closer union among [*all*] of the peoples of Europe'. Indeed, in *Bettray*, Advocate General Jacobs considered that the preamble to Regulation 1612/68 gave 'precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States'.[21] Hence, the Court began to stretch the definitions of the 'economic actor' so as to provide free movement rights to those who were not net contributors to the host State. Those employed on part-time or fixed-term contracts, who relied on host State welfare provision to supplement their earnings, remained 'workers', consequently enjoying residence rights and social and tax advantages, as long as their work was 'genuine and effective'.[22] Similarly, in a 'daring [judicial] milestone', the CJEU included service *recipients* within the freedom of services, though they were not covered by a strict and literal interpretation of Article 56 TFEU.[23] This served 'to expand the personal scope of the Treaty and make any *direct* economic link between the freedom exercised and the right(s) claimed less necessary'.[24] Further, the Union legislature adopted secondary legislation that afforded free movement rights to economically inactive individuals, subject to certain conditions such as economic self-sufficiency and comprehensive sickness insurance.[25] Thus, free movement

[19] European Commission, P.E. Deb, No.48, 135, 22nd November 1961, cited by A. Evans, 'European Citizenship' (1982) 45 MLR 497, 499

[20] N.11, Recital 3

[21] Case 344/87 *Bettray v Staatssecretaris van Justitie* [1989] EU:C:1989:113, para.29

[22] Case 53/81 *Levin v Staatssecretaris van Justitie* [1982] EU:C:1982:105; Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] EU:C:1986:223; Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] EU:C:1986:284; Case C-413/01 *Ninni-Orasche v Bundesminister für Wissenschaft, Verkehr und Kunst* [2003] EU:C:2003:600

[23] Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] EU:C:1984:35; Case 186/87 *Cowan* [1989] EU:C:1989:47. Since all of the constitutional developments discussed in this thesis overlap, the significance of the extension of the freedom of services to the service recipient was discussed in ch.2, s.2.2.2. as part of the analysis of the expansion in the personal scope of the free movement provisions.

[24] N. Nic Shuibhne, 'The Third Age of EU Citizenship', in P. Sypris (ed), *The Judiciary, the Legislature and the EU Market*, (CUP, 2012), 331, 335

[25] Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L180/26) (economically self-sufficient citizens); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their economic activity (OJ 1990 L180/38) (retired persons); Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L317/59). Although these very conditions led to these instruments frequently being collectively termed the 'Playboy

began to 'transcend the character of European integration as a purely economic project and to develop it in the direction of a political community'.[26]

Consequently, the 'incremental interpretative steps', highlighted above, 'became critical components in the legal construction of citizenship rights'.[27] Free movement, and the existing *market* citizenship that these interpretative stepping stones had engendered, offered a means by which the EEC could evolve into a more political and social union without seeming to diverge as radically from its constitutional origins as might otherwise have been the case. It was therefore logical that, when Union citizenship was formalised in the Maastricht Treaty, a right to move freely between the Member States would be central to the rights associated with it, and that this right would be built on existing internal market frameworks. It is to these 'gifts', which the internal market has been able to offer Union citizenship in the form of basic legal structures and historical legitimacy, to which we turn in the next section. This discussion will form critical background understanding for the later analysis of the transfer of the increased constitutional significance of free movement within Union citizenship into *economic* free movement, and the consequent exacerbation of structural bias within the two-stage breach/justification model.

However, it is worth pausing, first, to outline the potential contributions market citizenship was already making to architectural imbalance, and to increased interaction between free movement and fundamental rights, prior to the legal formalisation of citizenship at Maastricht. In particular, the gradual extension of social advantages to which Union workers were entitled, by its nature, created new interactions between free movement and programmes for securing fundamental social rights, implemented at domestic-level. Similarly, in *O'Flynn,* the need to recognise the family life of workers, in order to facilitate their free movement as economic actors, arguably forms part of the rationale for extending the definition of a breach of free movement from direct to indirect discrimination.[28] Although that decision came after the introduction of Union citizenship to the Treaty, there is no mention of it in the judgment itself. The case accordingly remains useful in demonstrating the Court's focus on creating an environment conducive to worker movement. Second, the legislative and judicial recognition

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Directives': see e.g. K. Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 CMLRev 1245

[26] F. Wollenschläger, 'A New Fundamental Freedom Beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration', (2011) 17 ELJ 1, 14

[27] N. Nic Shuibhne, n.24, footnote 15

[28] Case C-237/94 *O'Flynn*, n.16, para.22

of free movement as being a 'fundamental right'[29] of the Union worker that deserved 'precedence over the economies of the Member States',[30] 'loosened the nexus between free movement and market integration'.[31] Free movement was presented as something more than a tool for economic integration. As a right of the individual worker, it also offered opportunity for her/his social advancement. This indirectly legitimises, and reinforces the need for, the structural prioritisation of free movement over conflicting law and policy, since the promotion of free movement runs congruent to these broader benefits. And yet, as section four will argue in more detail, such architectural reinforcement can prove problematic where fundamental rights are in *conflict* with free movement. Moreover, recalling the discussion in chapter two and the description of *O'Flynn* above, the expansion of the material scope of free movement beyond direct discrimination has itself provoked more instances of clash between free movement and fundamental rights.

2.2. Free movement as the core right of the EU citizen: utilising the existing tools of the internal market to add value to a substantive Union citizenship

The Maastricht Treaty formally employed free movement in an explicitly non-economic capacity. Placed in a new Part of the Treaty,[32] free movement between Member States was to be available to individuals by virtue of their personal status as Union citizens.[33] Although other rights were also attached to this status,[34] the right to move and reside freely in the territory of the Member States has been described as the 'principal right of Union citizens'.[35] Indeed, the vast majority of the Court's citizenship case-law relates to the free movement rights of the Union citizen.[36] This focus on a right providing for the geographical mobility of

[29] Recital 3, Regulation 1612/68
[30] AG Jacobs, Case 344/87 *Bettray*, n.21
[31] Wollenschläger, n.26, 11
[32] Part Two of the TEC, 'Citizenship of the Union'; now, Part Two of the TFEU, 'Non-Discrimination and Citizenship of the Union'.
[33] Arts.20(2)(a) and 21 TFEU
[34] See s.1
[35] AG Poiares Maduro, Case C-524/06 *Huber v Bundesrepublik Deutschland* [2008] EU:C:2008:194, para.19; AG Colomer, Joined Case C-11/06 *Morgan v Bezirksregierung Köln,* and C-12/06 *Bucher v Landrat des Kreises Düren* [2007] EU:C:2007:174, para.67'; Everson, n.5, 73-74
[36] N. Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 CMLRev 1597, 1612. She notes that the exceptions to this trend are Case C-145/04 *Spain v United Kingdom* [2006] EU:C:2006:543 and Case C-300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] EU:C:2006:545, both concerning voting rights. Case C-34/09 *Ruiz Zambrano v ONEm* [2011] EU:C:2011:124 suggested a new avenue of case-law grounded in the concept of the 'genuine enjoyment of rights associated with Union

Union citizens, viewed against the historical constitutional development of the EU, is logical when one considers, as we did above, that 'the codification of citizenship rights within the Treaty marked just one step in the functional lineage of constitutionally enhanced free movement rights'.[37] A Union citizenship that focused on free movement, albeit extending it to a wider cohort, represented an incremental step in an existing, and largely accepted, framework. Moreover, the right to move and reside freely in *all* Member States brings appreciable added-value to a supranational citizenship. Free movement between different sovereign Member States allows EU citizenship to offer individuals something that national citizenship does not.[38]

As a result of this historical evolution, free movement under citizenship was built upon the basic legal structures of economic free movement, resulting in permeable boundaries between a market-based freedom and a human-based right. For instance, as within the economic free movement provisions, the wholly internal rule is used within citizenship to define the scope of Union law. It has been argued that this rule is unnecessary in the context of Union citizenship, where the focus is on personal, rather than economic status, and where resort to the principle of equality would be more suitable.[39] Nevertheless, using judicial reasoning established in the context of the economic free movement provisions, the CJEU has, for example, held that a Union citizen cannot access the generous family reunification rights that are available under Union law unless there is a cross-border element to her/his situation.[40] This means that any

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citizenship' but subsequent case-law has linked this to the exercise of cross-border movement e.g. Case C-434/09 *McCarthy v SSHD* [2011] EU:C:2011:277; Case C-40/11 *Iida v Stadt Ulm* [2013] EU:C:2012:691

[37] Nic Shuibhne, ibid, 1627

[38] Nevertheless, various commentators have questioned the extent to which Part Two of the TFEU is able to offer what they consider to be a meaningful citizenship. For instance, Union citizens remain unable, under EU law, to vote in national parliamentary elections of the host State, leaving Union citizens 'excluded so decisively from participation in the multi-level political mosaic of EU-decision-making'. Nic Shuibhne, n.36, 1622. See also J. Shaw, 'EU Citizenship and political rights in an evolving European Union' (2007) 75 Fordham Law Review 2549; and more broadly, Everson, n.5, 77

[39] Tryfonidou, n.4; c.f. C. Dautricourt and S. Thomas who question whether this would be a premature step at the present state of development of Union law, 'Reverse Discrimination and Free Movement of Persons under Community Law: all for Ulysses, nothing for Penelope?' (2009) 34(3) ELRev 433, 454

[40] Joined Case C-64/96 and C-65/96 *Land Nordrhein-Westfalen v Uecker and Jacquet* [1997] EU:C:1997:285, relying on, *inter alia*, Joined Case 35/82 and 36/82 *Morson and Jhanjan v Netherlands* [1982] EU:C:1982:368; Case 147/87 *Zaoui v CRAMIF* [1987] EU:C:1987:576. The wholly internal rules was recently called into question in the citizenship context by the Court's findings in Case C-34/09 *Ruiz Zambrano*, n.36, whereby EU law would also be triggered by activity that deprived Union citizens of the genuine enjoyment of rights associated with their Union citizenship. See D. Kochenov, R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance?' (2012) 37 ELRev 369; N. Nic Shuibhne, '(Some) of the Kids Are Alright: Commentary on *McCarthy* and *Dereci* (2012) 49 CMLRev 349, 364-366. However, recent case-law appears to have limited the transformative potential of *Ruiz Zambrano* in this regard: Case C-40/11 *Iida*, n.36. See S. Reynolds, 'Exploring the 'Intrinsic Connection' between Free Movement and the Genuine Enjoyment Test: Reflections on Union Citizenship after *Iida*' (2013) 38(3) ELRev 376

fundamental rights benefit – for instance in relation to the fundamental right to family life or access to fundamental social rights – that Union citizenship is able to offer citizens is only as a corollary of its promotion of free movement. Moreover, the use of the wholly internal rule is evidence of the maintenance of historical links between the free movement operating under Union citizenship and the market freedoms.

A further example of the borrowing of internal market structures by Union citizenship is visible in relation to permissible restrictions on free movement rights. Article 21 TFEU does not designate specific derogations from the right to free movement that it bestows upon Union citizens. Rather, it references 'limitations and conditions laid down in the Treaties and secondary legislation'. Article 45(3) TFEU, relating to conditions placed upon the free movement of workers, and Article 52(1) TFEU, regarding limitations on the freedom to provide services/freedom of establishment, both permit restrictions for reasons of public policy, public security, or public health. Thus, in interpreting derogations from the free movement rights of Union citizens, detailed in secondary legislation implementing citizenship rights, the Court has drawn on its previous case-law relating to derogations from the free movement of workers and services.[41] It has also structured them using the standard two-stage approach, requiring derogations from Article 21 TFEU to be interpreted 'strictly'.[42] Given the beginnings of Union citizenship, this borrowing makes sense. As Nic Shuibhne notes, it might have been legally cleaner to start from scratch and abandon the limitations prescribed by the (pre-Maastricht) residence directives, but it would have been 'politically stupid'.[43] Further, since it attaches to the individual status of the Union citizen, there would seem to be a greater need to interpret derogations from Article 21 TFEU restrictively. Nonetheless, for our purposes, this approach is significant since it maintains architectural connections between Union citizenship and economic free movement, creating routes by which developments within the former can cross-pollinate into the latter. Moreover, as will be discussed further later, citizenship's focus on the individual could indirectly contribute to the imposition of a heavier evidentiary burden on fundamental rights where they clash with free movement.

[41] Case C-33/07 *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Jipa* [2008] EU:C:2008:396, para.23, citing Case 36/75 *Rutili v Ministre de l'intérieur* [1975] EU:C:1975:137; Case 30/77 *R v Bouchereau* [1977] EU:C:1977:172; Case C-54/99 *Église de scientologie* [2000] EU:C:2000:124; and Case C-36/02 *Omega* [2004] EU:C:2004:614

[42] Ibid

[43] N. Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in C. Barnard, O. Odudu (eds), *The Outer Limits of European Union Law*, (Hart, 2009), 167, 175

In truth, it is impossible to demarcate cleanly between the economic free movement provisions and the free movement that is specific to Union citizenship. Economic actors, such as workers or the self-employed, are *also* Union citizens. It is the same cross-border activity that triggers both their human-based rights as Union citizens, and their market-based freedoms as economic actors. Indeed, this straddling of the personal and the economic is recognised by Directive 2004/38. This instrument places the free movement rights of both economically active and economically inactive persons under the same legal framework, although the conditions for the exercise of those rights continue to differ according to whether an individual is economically active or inactive. Thus, blurred lines between Union citizenship and the market freedoms are unavoidable, and legislating for both under the same umbrella is arguably practical. Nevertheless, this does not alter the fact that these shared legal structures create a clear portal by which changes occurring within citizenship can seep into the market freedoms.

These links between Union citizenship and the internal market nevertheless raised questions, themselves, about the ability of Union citizenship to provide anything more for Union citizens than market citizenship already offered. This calls into question whether a formalised Union citizenship raised the constitutional significance of obstacles to free movement at all. Accordingly, the next section is concerned with demonstrating that, despite still being subject to cogent criticism that citizenship's market origins inhibit its reach in relation to economically inactive Union citizens,[44] Union citizenship has increased the normative force of free movement. This in turn has reinforced the structural prioritisation of free movement over competing activity.

3. Legitimising a free movement bias? The personalisation and fundamentalisation of the economic free movement provisions as a result of Union citizenship

In order to demonstrate the indirect contributions that the concept of Union citizenship has made to the two-stage breach/justification model, this section will first outline that, in order to create something meaningful for economically *inactive* Union citizens, it was necessary to

[44] N.4 and n.5.

forge a link between free movement and the *personal*, as opposed to economic, status of the EU citizen. This personalisation of free movement, alongside its presentation as a *right* of the Union citizen, has promoted it to the status of *fundamental right*, in the context of Union citizenship. Crucially, this qualitative change increases the perceived need for a procedural preference for free movement over competing norms and activity, legitimising the use of the free movement-enhancing two-stage model. The section will establish, second, that since the free movement rights of the Union citizen and the market freedoms operate under the same legal framework, and can be exercised simultaneously by, for instance, Union workers, this substantive modification is able to cross-pollinate into the economic context. Economic free movement becomes a moral good that must be assured if the fundamental rights of the economic actor are to be respected. This increases the perceived need for the general structural prioritisation of free movement over opposing rules. However, where the fundamental rights of individuals *conflict* with free movement, this same two-stage process works *against* those rights.

3.1. The personalisation and fundamentalisation of free movement within Union citizenship

Although concerns about the effectiveness of a formalised Union citizenship built on market foundations were pertinent, the introduction of a right to free movement for all Union citizens, by the Maastricht Treaty bestowed free movement, at the very least, with a new symbolic significance.[45] Under what is now Part Two of the TFEU, free movement was sited within a list of the *personal* rights of the Union citizen, unrelated to their economic status. Thus, although still an essential cog in the internal market machine, the Member States had elevated free movement beyond its economic foundations. Free movement was no longer merely a means of attaining an internal market, but a right belonging to Union citizens; an end to be protected in and of itself. As Kostakopoulou has argued, the Maastricht Treaty, and the introduction of Union citizenship, tied the Union law rights of free movement and residence to the political status of the citizen. This, in turn, contributed to a transformation within free movement.[46] From here on in, it would frequently be necessary to consider not only the

[45] Arts.20 and 21 TFEU
[46] Kostakopoulou, n.3, 634

impact on the internal market of a breach of free movement, but also the potential infringement of key citizenship rights of the individuals concerned.

This conceptual metamorphosis allowed the Court to readjust the components of free movement to cater better, at least to some extent, for the diversity of Union citizens. Not all Union citizens were economic actors, but by virtue of their Union citizenship, they all enjoyed a *personal* right to free movement. Thus, in *Martinez Sala*,[47] the Court made clear that economic status was irrelevant to the availability, in principle, of free movement rights. Free movement was a personal right, inherent and central to an individual's status as a Union citizen. Moreover, this created a portal to the principle of non-discrimination, pursuant to Article 18 TFEU, which meant, in turn, that Ms. Martinez Sala was able to access social welfare in her host State on the same basis as a national. Nevertheless, Article 21 TFEU permitted conditions to be placed on the exercise of free movement. For instance, economically inactive individuals could only reside in the host State, pursuant to that provision, if they were economically self-sufficient and therefore did not pose an unreasonable burden on that State.[48] However, in *Grzelczyk*,[49] the CJEU held that individuals could not be automatically expelled from a host State by virtue of their temporary reliance on host State social support.[50] Union citizenship was 'destined to be the fundamental status of the nationals of the Member States'[51] and, having exercised their right to move, individuals should not be denied access to the fundamental principle of non-discrimination in relation to social welfare.[52] Similarly, in *Baumbast*, the Court subjected the requirement, contained in Directive 2004/38, that economically inactive individuals and their family members have comprehensive medical insurance in the host State, to a strict proportionality assessment in

[47] Case C-85/96 *Martinez Sala*, n.2
[48] Art.21 TFEU confers the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. Art.7(1)(b) Directive 2004/38 requires economically inactive Union citizens to have sufficient resources for themselves and their family members and comprehensive sickness insurance. This echoed the conditions contained in the previous 'Residence Directives' (n.25).
[49] Case C-184/99 *Grzelczyk*, n.2
[50] Ibid, para.46
[51] Para.31
[52] However, as the Court reiterated in its recent judgment in Case C-333/13 *Dano*, n.5, access to special non-contributory cash benefits within a host State can require that the Union citizen has a 'right to reside' in the host State. While *Grzelczyk* dictates that a certain amount of financial solidarity is required between the Member States in relation to periods of temporary financial need, and that resort to social support cannot lead to automatic exclusion from the host State, an economically inactive Union citizen's right to reside, at least under Directive 2004/38, does generally rest on their having sufficient financial resources to sustain themselves.

light of the impediment it placed on the exercise of free movement rights, a core right of Union citizens.[53]

The notion that Union citizenship was destined to be the fundamental status of Union citizens, suggested that free movement was not only being personalised, but also *fundamentalised*, since free movement was the central right of the Union citizen. Indeed, in *Huber*, Advocate General Maduro explicitly stated that Union citizenship's fundamental status was a 'legal concept' that went hand-in-hand with specific rights, 'principal amongst these being the right to enter and live in another Member State'.[54] This is supported by the statement in the preamble to Directive 2004/38 that EU citizenship is the 'fundamental status of nationals of the Member States when they exercise their right of free movement and residence'.[55] Indeed, both the Court and its Advocates General have explicitly referred to free movement as a *fundamental right* of the Union citizen. In *Bidar,* Advocate General Geelhoed stated that attempts to tackle benefit tourism should not 'undermine the fundamental rights of EU citizens residing lawfully within [the host State] territory'.[56] In *Chen*, the CJEU considered the UK requirement that a Union citizen should personally possess the sufficient resources necessary to avoid becoming an unreasonable burden on the host Member State to be a 'disproportionate interference with the *fundamental right* of freedom of movement upheld by [Article 21 TFEU].'[57] This has led Elsmore and Starup to argue that a formalised Union citizenship pointed to 'the emergence in law of a *fundamental right, resulting from* a genuine extension of Community jurisprudence to encompass the economically inactive person's right to free movement [emphasis added]'.[58]

The above discussion has demonstrated that Union citizenship has made some contributions to increasing the constitutional significance of a breach of free movement. By attaching free movement to the personal status of Union citizens, and treating it as a fundamental right, economically inactive Union citizens have been able to access fundamental social rights from which they would otherwise have been precluded within the host Member State. Accordingly, EU citizenship seems to have enhanced the protection of fundamental social rights within the

[53] Case C-413/99 *Baumbast and R v SSHD* [2002] EU:C:2002:493
[54] Case C-524/06 *Huber*, n.35, para.19
[55] Recital 3
[56] Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] EU:C:2004:715, para.50
[57] Case C-200/02 *Zhu and Chen v SSHD* [2004] EU:C:2004:639, para.33; see also Elsmore, Starup, n.3, 91
[58] Elsmore, Starup, n.3

Union legal order. However, defining a Union citizen's right to free movement as a fundamental right implicitly necessitates a stricter approach to those activities that limit its realisation. This naturally invites a two-stage breach/justification framework that affords procedural and evidential priority to free movement. It will be recalled from chapter one, for instance, that such an adjudicative methodology is utilised by the European Court of Human Rights for addressing tensions between Convention rights and public interests.[59] Since Union citizenship uses the same basic legal structures as the market freedoms, any fundamentalisation of free movement within citizenship is likely also to fundamentalise the exercise of free movement by the economically *active*. In this context, the structural boost provided by Union citizenship might operate to the benefit of economically dominant social groups where their free movement rights *clash* with fundamental rights protected at national-level. Indeed, O'Brien has remarked that the focus of Union citizenship on the individual right to free movement can, at times, ironically, 'overlook the individual' and the duties of society to protect the vulnerable.[60]

To explore this further, the next subsection will analyse the transfer of free movement's conceptual metamorphosis from Union citizenship into the internal market. This lays important groundwork for the discussion, in section four, of the potentially negative consequences, from a fundamental rights perspective, of the fundamentalisation of the market freedoms.

3.2. Personalising the market freedoms: the transfer of the increased constitutional significance of a breach of free movement into the internal market

The free movement that exists pursuant to Union citizenship and the Treaty's market freedoms are clearly not mutually exclusive. First, in exercising their free movement rights as Union citizens, economically active individuals are plainly still playing their crucial part in the functioning of the internal market. There is a simultaneous triggering, by economic actors, of both economic *and* citizenship free movement by the same cross-border activity. As a result, in many cases, the CJEU is tasked with deciding whether both an individual's right to

[59] Ch.1, s.3.2.2. *Kudla v Poland* App.no:30210/96, concerning Art.5 ECHR (right to liberty and security); *Rowe and Daniels v UK* App.no:28901/95, concerning Art.6 ECHR (right to a fair trial)
[60] O'Brien, n.5, 1676, discussing the market as a 'new morality'.

free movement as a Union citizen *and* her/his ability to move around Europe as an economic actor have been restricted. Consequently, in these judgments, the Court has treated the general free movement right of Union citizens as a *lex generalis* of the economic free movement provisions.[61] Additionally, the Court frequently uses the term 'Treaty freedoms' to group the economic free movement provisions and Article 21 TFEU.[62] The treatment of, for instance, Article 45 TFEU, on workers, as a *lex specialis* of Article 21, alters the substance of Article 45. It is no longer merely a mechanism to enable individuals to play their roles as factors of production. It also provides specific expression to the rights of Union citizens, who happen also to be workers, to move and reside freely within the territory of the Member States.[63] As Nic Shuibhne notes, both primary and secondary instruments of Union citizenship transform and unify, at least the personal free movement provisions, under the language of *rights*.[64] Within the case-law, Advocate General Maduro has explicitly argued for a reassessment of the constitutional significance of the economic free movement provisions in the light of Union citizenship:

> …it would be neither satisfactory nor true to the development of the case-law to reduce the freedom of movement to a mere standard of promotion between Member States… At present, the freedoms of movement must be understood to be one of the essential elements of the 'fundamental status of the nationals of the Member States'.[65]

Consequently, it is not just free movement under Union citizenship that has become a means in and of itself, but also economic free movement.[66] As Kostakopoulou put it, 'Union citizenship has transformed 'the presence in the territory of the host State of [Union] workers, work-seekers, establishers, [and] service providers…[from] a matter of state toleration…[to] an issue of exercising fundamental rights'.[67]

[61] Case C-155/09 *Commission v Greece* [2011] EU:C:2011:22, para.41; Case C-233/12 *Gardella v INPS* [2013] EU:C:2013:449, paras.38-41
[62] Case C-589/10 *Wencel v Zakład Ubezpieczeń Społecznych w Białymstoku* [2013] EU:C:2013:303, para.69
[63] See the Opinion of AG Jacobs in Case C-168/91 *Konstantinidis v Stadt Altensteig and Landratsamt Calw* [1993] EU:C:1992:504
[64] Nic Shuibhne, n.43, 184-185
[65] Joined Case C-158/04 *Alfa Vita Vassilopoulos AE* and C-159/04 *Carrefour Marinopoulos AE v Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] EU:C:2006:212, para.40
[66] See also Wollenschläger, n.26, who points to the emergence of a new fundamental freedom beyond market integration as leading to a wider shift away from the economic paradigm of European integration towards the future significance of the fundamental freedoms as a distinct legal category, 2-3
[67] Kostakopoulou, n.3, 634

The new constitutional significance of the personal economic free movement provisions – i.e. those more closely related to the economic activity of individuals, such as workers or the self-employed, than business undertakings – is reflected in the fact that, post-Maastricht, new areas of Member State law and policy have fallen within their scope. For instance, in *Collins*,[68] the Court departed from its pre-citizenship decision in *Lebon*,[69] and held that 'in view of the establishment of citizenship of the Union, [it is] no longer possible to exclude from the scope of [Article 45(2) TFEU], concerning the equal treatment of workers, a financial benefit intended to facilitate access to employment…for work-seekers'.[70] Similarly, in *Bickel and Franz*,[71] the CJEU referred to the introduction of Union citizenship to strengthen its pre-Maastricht decision[72] to include service *recipients* within the scope of Article 56 TFEU.[73] It also reinforced the finding, in *Bickel* itself, that, in restricting the possibility of having one's criminal trial proceed in German to residents of the Italian region of Bolzano, rather than extending this to German-speaking service recipients, Italy had breached Article 56 TFEU.[74] Thus, the personalisation of free movement has seeped into the economic free movement provisions. Indeed, as Nic Shuibhne has pointed out, in cases such as *Bickel*, 'there was an interchangeability at play with citizenship and traditional free movement rights often meaning (and conferring) the same thing'.[75]

This is also arguably evident in cases such as *Carpenter*, in which the Court does not explicitly refer to Union citizenship, but where it is possible that its existence has impacted on perception of the free movement provisions.[76] It will be recalled from chapter one that Mr. Carpenter ran a business offering advertising services, including to clients based in other Member States. His wife, Mrs. Carpenter, a third country national, faced deportation to the Philippines. Mr. Carpenter challenged his wife's deportation order as a breach of Article 56 TFEU. When the matter was referred to the CJEU, the Court held that the separation of the couple:

[68] Case C-138/02 *Collins*, n.2
[69] Case 316/85 *CPAS de Courcelles v Lebon* [1987] EU:C:1987:302
[70] Para.63; though they must be genuinely seeking work and demonstrate a 'real link' to the host State. See also Case C-333/13 *Dano*, n.5
[71] Case C-274/96 *Bickel and Franz* [1998] EU:C:1998:563
[72] Joined Cases 286/82 and 26/83 *Luisi and Carbone*,; Case 186/87 *Cowan*, n.23
[73] Para.15-16
[74] Ibid
[75] Nic Shuibhne, n.43, 170
[76] Case 60/00 *Carpenter* [2002] EU:C:2002:434

…would be detrimental to their family life and, therefore, the conditions under which Mr. Carpenter exercises [the freedom to provide services]. That freedom could not be fully effective if Mr. Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.[77]

However, beyond this general reference to the conditions under which Mr. Carpenter provided cross-border services, the CJEU conducted no detailed assessment of *how* or *why* Mrs. Carpenter's deportation would present a particular barrier to Mr. Carpenter's performance of this economic activity. The referring court had asked whether Mrs. Carpenter could be viewed as indirectly assisting Mr. Carpenter's freedom to provide services by caring for his children from a previous marriage.[78] However, the CJEU only referred to this role in its assessment of whether the Carpenters' family life could be viewed as genuine.[79] As a result, the link between the family separation and restrictions to the freedom of services is generally viewed as slight[80] and it has been argued that, despite there being no explicit mention of Union citizenship in the case itself, *Carpenter* 'is far closer to citizenship than to services'.[81] It is submitted here that the underlying potential influence of citizenship on the outcome of a case, which the Court views exclusively from the perspective of services, is made possible by the blended history of Union citizenship and the internal market, their shared basic legal structures, and Mr. Carpenter's simultaneous exercise of his rights as a Union citizen and as a provider of cross-border services. Indeed, as the economic free movement provisions so often also engage Union citizenship, vastly differing approaches to citizenship rights and the market freedoms will often be impractical. As a result, it is likely that any evolution affecting free movement within Union citizenship will also impact upon free movement under the internal market, even in cases where an express reference to Union citizenship is lacking.

The increased 'breachability' of the economic free movement provisions in the line of post-Maastricht case-law described above is the result of the personalisation and fundamentalisation of free movement taking place within Union citizenship. This, in itself,

[77] Para.39
[78] Paras.19-20
[79] Para.44
[80] Nic Shuibhne, n.40, 374; see also T. Perišin, 'Interaction of Fundamental (Human) Rights and Fundamental (Market) Freedoms', (2006) 2 CYELP 69, 78-85; E. Spaventa, 'Federalisation Versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009) 343, 351-352
[81] Nic Shuibhne, n.43, 174. See also E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non)-Economic European Constitution', (2004) 41 CMLRev 743

legitimises the use of the two-stage breach/justification procedure for the adjudication of clashes between free movement and opposing law and policy. If, according to Union citizenship, free movement pursues a fundamental right of the Union citizen, then this logically calls for an adjudicative approach that requires conflicting activity to justify itself against this *prima facie* problematic conduct. The two-stage breach/justification model provides an effective structure to meet these needs. Union citizenship has also reinforced and even intensified the need to impose a strict proportionality assessment on law and policy, which restricts free movement, at the justification phase. Thus in *Orfanopoulos*, the Court explicitly stated that:

> …a *particularly restrictive* interpretation of the derogations from [the free movement of workers] is required *by virtue of a person's status as a citizen of the Union*. As the Court has held, that status is destined to be the fundamental status of the nationals of the Member States [emphasis added].[82]

As section four discusses in more detail, the broadening of what constitutes a breach of the market freedoms, along with the requirement to take a 'particularly restrictive' approach to proportionality, in the light of Union citizenship, could present problems when free movement clashes with fundamental rights. However, it is necessary to consider, first, the extent to which citizenship has infused the market freedoms with a renewed constitutional significance. Specifically, commentators such as White have argued that there is a human/trade dichotomy operating within the market freedoms. He has posited that Union citizenship offers a constitutional right to move to people, including workers and, in some instances service providers, whereas 'businesses enjoy a lesser Community right to move under the original economic free movement provisions'.[83] In other words, Union citizenship's capacity to strengthen an architectural preference for economic free movement might be limited to the personal economic free movement provisions, to the exclusion of goods and capital, but also, where relevant, service provision and establishment. It is submitted, here, that that is not the case.

It is accepted that Union citizenship is likely to have a less *direct* impact on the non-personal free movement provisions. When goods are prevented from crossing an intra-EU border, their ability to perform their role as factors of production is clearly restricted. However, they are

[82] Joined Case C-481/01 and C-493/01 *Orfanopoulos and Oliveri v and Baden-Württemberg* [2004] EU:C:2004:262, para.65
[83] R. White, *Workers, Establishment and Services in the European Union*, (OUP, 2004), 260-261

not denied any free movement 'rights' attached to their 'fundamental status' as 'Union goods'. This suggests that the non-personal freedoms have not been elevated to fundamental rights status. Indeed, a survey of the services and goods case-law, carried out by Oliver and Roth, found only one reference to fundamental rights terminology.[84] Further, Currie points out that workers posted by service providers, who exercise their free movement rights via Article 56 TFEU on services, do not enjoy the same rights as workers pursuing free movement under Article 45 TFEU on workers. Specifically, they do not enjoy rights under Directive 2004/38, such as the right to bring family members with them to the host State.[85] In *Laval*, the Court focused on the inability of the undertaking, Laval, to provide its services in Sweden with no mention on the collateral impact this had on Laval's workers to enjoy their own free movement rights.[86]

Nevertheless, there is evidence that the constitutional significance of the non-personal free movement provisions has been increased *indirectly*, in some cases, by focusing on the citizenship rights of the trader. Thus, in a number of cases, the Court has demonstrated a willingness to consider the person behind the freedom to provide services. This recognition began in the days of market citizenship with the introduction of the service *recipient* in *Luisi and Carbone*.[87] However, we have seen that a formalised Union citizenship strengthened the position of the service recipient in *Bickel*.[88] It also, arguably, allowed the Court to consider more closely the fundamental rights of the service *provider* in *Carpenter*.[89] Moreover, in *Laval*, Advocate General Mengozzi did acknowledge that the restriction of Laval's free movement of services indirectly caused the posted workers to lose their temporary employment in another Member State.[90] In addition, the Union legislature has acknowledged that Union citizenship has rendered it necessary to review the legal framework concerning the

[84] Case C-228/98 *Dounias v Ypourgio Oikonomikon* [2000] EU:C:2000:65, para.64, concerning goods but citing Case 222/86 *Heylens* [1987] EU:C:1987:442, para.14 on the free movement of workers as part of the fundamental right to employment. P. Oliver, W. Roth, 'The Internal Market and the Four Freedoms', (2004) 41 CMLRev 407. See also, Nic Shuibhne, n.43, 184-185. In Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] EU:C:1981:163, the Court also explicitly presents the free movement of goods, at p.1815, as forming part of the fundamental right to pursuing a trade without interference. However, this does not appear in the French or German versions of the case.
[85] S. Currie, 'Men on the Sidelines: The Reconciliation of Work and Family Life Agenda in the Context of Cross-Border Posting, (2013) 35(3) J. Soc. Wel. & Fam. L. 389, 401
[86] Case C-341/05 *Laval* [2007] EU:C:2007:809
[87] Joined Cases 286/82 and 26/83 *Luisi and Carbone*, n.23
[88] Case C-274/96 *Bickel*, n.71
[89] Case C-60/00 *Carpenter*, n.76
[90] Case C-341/05 *Laval* [2007] EU:C:2007:291, para.256

self-employed.[91] More recently, in the context of goods, Tryfonidou has contended that 'a meaningful notion of Union citizenship, which is the "fundamental status of nationals of the Member States" [calls on] the Union to grant a number of minimum rights to all citizens, including the (economic) right to conduct a commercial activity…in an interstate context'.[92] Similarly, Horsley has recently argued that the free movement of capital is an essential facilitator of the free movement rights of ordinary Union citizens since '[c]apital movements also cover, *inter alia*, property purchases, mortgages, inheritances, and personal loans – routine economic transactions for millions of mobile Union citizens'.[93] In *Alfa Vita*, which concerned the free movement of goods, Advocate General Maduro explicitly endorsed a general test of 'discrimination against the exercise of free movement' for triggering *all* of the market freedoms 'in light of the requirements of a genuine Union citizenship'.[94] For the Advocate General, the 'fundamental freedoms must be understood to be one of the essential elements of the "fundamental status of nationals of the Member States"'.[95] Such an approach would raise the substantive importance of *all* of the economic free movement provisions.

However, in the final judgment, the CJEU did not adopt this stance, making no reference to Union citizenship.[96] Certainly, others have argued against the need for the rules on free movement to converge in the light of Union citizenship. For example, Nic Shuibhne views Union citizenship as emphasising the person/trade dichotomy 'all the more sharply'. She finds Tryfonidou's argument, outlined above, that a meaningful citizenship requires a right to conduct cross-border commercial activity, to be problematic 'when the consequence is a general "right to do business everywhere in the Union", leading to the question of whether the Union seeks the general deregulation of the market'.[97] However, it is submitted that this critique goes to the normative question of whether the non-personal market freedoms *should* be treated as a fundamental right. That issue is addressed in chapter five. Here, we are concerned with the narrower, factual question of whether Union citizenship is encouraging re-

[91] Recital 3, Directive 2004/38, n.14
[92] A. Tryfonidou, 'Further Steps on the Road to Convergence Among the Market Freedoms', (2010) 35(1) ELRev, 36, 41-43
[93] T. Horsley, 'Death, Taxes and (Targeted) Judicial Dynamism: The Free Movement of Capital in EU Law', in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, (OUP, forthcoming), ch.23
[94] Case C-158/04 *Alfa Vita*, n.65, paras.46 and 51
[95] Para.40
[96] Case C-158/04 *Alfa Vita* [2006] EU:C:2006:562
[97] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Case Law of the Court of Justice*, (OUP, 2013), 32-36

assessment of the constitutional significance of a breach of the non-economic free movement provisions. These very discussions demonstrate that it is.

Moreover, the increasing convergence around the market freedoms generally, creates a means by which changes taking place within Union citizenship can influence the non-personal free movement provisions. Increasingly, the Court faces the question of whether a certain activity breaches a wide range of the free movement provisions. In dealing with this task, the Court often groups the free movement provisions together. This joint assessment of Article 21 and the economic freedoms can mean that the increased constitutional importance of free movement in the citizenship context can cross-pollinate into the Court's analysis of the other free movement provisions.

In the *Libert* case,[98] the Court assessed whether Articles 21 (citizenship), 45 (workers), and 49 TFEU (establishment) *together* precluded a Flemish rule, which made the transfer of immovable property in certain communes subject to the existence of a 'sufficient connection' between the prospective buyer/tenant and the geographical area concerned. In its analysis, the Court focused on the general right to movement of the Union citizen in order to establish a breach of *all* of these provisions.[99] In its admittedly separate examination of whether Article 56 TFEU (services) had been restricted, the Court nevertheless noted that 'business activities' and 'undertakings' would be unable to sell property to 'just any Union citizen'.[100] Similarly, the Court's statement, that the Decree restricted the free movement of capital, because it was likely to discourage residents from one Member State from making investments in immovable property in another, acknowledges the Union citizen decision-maker who (usually) sits behind the economic actor. Moreover, having established a breach of Articles 21, 45, 49, 56, and 63, the Court assessed potential justifications for all of these restrictions *at once*. This meant that the Court did not differentiate between *personal*, *fundamental* free movement rights, which *Orfanopoulos* stipulated require a 'particularly restrictive' approach to derogations,[101] and what White refers to as the 'lesser Community rights' of business undertakings. This allows the enhanced prioritisation of free movement under citizenship to be transferred into the economic free movement provisions. Moreover, as the Court is increasingly formulaic in its

[98] Joined Cases C-197/11 and C-203/11 *Libert* [2013] EU:C:2013:288
[99] Paras.38-41
[100] Para.43; Moreover, AG Mazák did not separate the freedoms at all in his analysis of the dispute, EU:C:2012:621, paras.26-28
[101] Joined Cases C-481/01 and 493/01 *Orfanopoulos*, n.82

application of the breach/justification procedure, it is possible to speculate that it will be unlikely that clear distinctions will be made in relation to precisely how much architectural priority should be afforded to free movement in a given situation, even in cases only involving economic free movement.

In a different context, the 'real link' case-law provides an obvious example of the transfer of approaches specific to Union citizenship across the shared free movement architecture and into the internal market. Thus, in the cases of *Geven* and *Hartmann*,[102] concerning frontier *workers*, the Court applied the 'real link' test, a concept used in Union citizenship to determine access to social benefits for economically *inactive* individuals. As a result, the workers in those cases were required to demonstrate that their work was substantial in order to prove a real link to the host State. This approach contradicted the well-established rule, applied in a wealth of Article 45 TFEU case-law, that workers are entitled to equal access to social welfare provided that their work is 'genuine and effective' and not 'marginal and ancillary'.[103]

Thus, to a greater or lesser extent, Union citizenship appears to have both legitimised and enhanced the structural prioritisation of free movement over conflicting activity. The dual status of certain individuals as both workers and Union citizens has resulted in Union citizenship making direct contributions to the increased constitutional significance of Article 45 TFEU. At times, this has also been true for establishers and service providers. At other times, Union citizenship has made more indirect contributions to fundamentalising the provisions on services and establishment, as well as goods and capital, through its enhancement of a two-stage breach/justification procedure generally, since this is an adjudicative structure adopted in relation to all of the free movement provisions.

As the next section explains, the status of free movement as a fundamental right can have potentially negative consequences for the protection of (other) fundamental rights when these *clash* with free movement. Union citizenship has, first, resulted in a greater level of interaction between the requirements of free movers and the, at times, conflicting duties of the

[102] Case C-213/05 *Geven v Land Nordrhein-Westfalen* [2007] EU:C:2007:438; Case C-212/05 *Hartmann v Freistaat Bayern* [2007] EU:C:2007:437

[103] Case 53/81 *Levin*; Case 139/85 *Kempf*; Case 66/85 *Lawrie-Blum;* Case C-413/01 *Ninni-Orasche*, n.22. For comment in this regard, see C. O'Brien, 'Case C–212/05, *Gertraud Hartmann v. Freistaat Bayern*; Case C–213/05,*Wendy Geven v. Land Nordrhein–Westfalen*; Case C–287/05,*D.P.W. Hendrix v. Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen*', (2008) 45(2) CMLRev 499

Member States to implement programmes for the protection of fundamental social rights. Moreover, the two-stage breach/justification process, bolstered by Union citizenship, dictates that these interactions are assessed through a free movement lens. In short, the constitutional entrenchment of the two-stage model elevates free movement *beyond* fundamental rights status, treating the former as *more* fundamental than the latter. The pursuit of free movement is procedurally favoured as Member States are obliged to defend their fundamental social rights models against a *prima facie* finding of wrongful restrictions of the market freedoms.

4. Safeguarding fundamental rights only as a side-effect of boosting free movement: the potentially negative impact of Union citizenship where fundamental rights conflict with free movement

Owing to its focus on free movement as the core right of the Union citizen, Union citizenship is only able to promote the fundamental social rights of Union citizens as a side-effect of promoting their exercise of free movement. This outcome would, nevertheless, seem mutually beneficial, for Union citizens, for the internal market, and for the broader integrative aims of a polity targeted towards an ever-closer union among the peoples of Europe. However, a deeper analysis reveals that this is not always the case. While Union citizenship is able to protect, to some extent, the fundamental social rights of economically inactive *free movers*,[104] the most vulnerable members of society might also be the least likely to exercise their free movement rights. Movement is not an 'inevitable, neutral, or "natural" selective tool'.[105] It requires an individual to have the financial means, (often) the linguistic ability, the general confidence, and the knowledge of one's rights as a Union citizen, before she/he will move in practice.[106] The focus of Union citizenship on *movement* to activate rights under Union law currently precludes the use of Union citizenship to enhance the rights of non-movers. In this context, this task still largely falls to the Member States.[107]

However, the focus of Union citizenship on movement has, in fact, posed a challenge to Member States' abilities to perform this function. First, Union citizenship has resulted in

[104] Though access to fundamental social rights can still be subject to conditions such as legal residence. See Case C-333/13 *Dano*, n.5
[105] O'Brien, n.5, 1660
[106] Reynolds, n.40, 388
[107] Outside of this context, Union social policy on equal pay, working time, or fixed-term employment do not rely on movement. See e.g. Case C-144/04 *Mangold v Helm* [2005] EU:C:2005:709

clashes between a broader range of domestic measures and the free movement provisions. This includes Member State efforts to implement fundamental social rights. By contrast, where the needs of individuals run congruent to free movement, Union citizenship has, in some instances, served to *reduce* the breachability of the free movement provisions, reversing established inclusive approaches. Second, the fundamentalisation of free movement by Union citizenship increases connotations of wrongful conduct in relation to breaches of free movement. Free movement is viewed as a moral 'good', necessarily implying that restrictions upon it are a 'wrong' to be avoided. This warrants special protection for free movement, exposing to strict proportionality assessment Member State efforts to offer programmes of social protection where they conflict with free movement. It will be recalled from chapter two, that the two-stage breach/justification approach does not impose any proportionality test on free movement and, therefore, generally precludes consideration, at the breach stage, of the potentially detrimental impact that free movement can have on domestic fundamental rights. Moreover, this method of examining proportionality requires the Member States to implement fundamental social rights in a way that imposes the fewest possible restrictions on free movement. While offering the best outcome for *free movers*, this might not be the paramount approach from a fundamental rights perspective, since it might lead to lower fundamental rights standards in practice. Nevertheless, free movement is seen as the *most* fundamental right and structurally favoured over opposing fundamental rights.

4.1. The altered 'breachability' of free movement by the pursuit of fundamental social rights post-citizenship

The increased breachability of free movement in light of Union citizenship can be seen in the cases of *Martinez Sala*, *Grzelczyk,* and *Collins*, outlined above.[108] In those decisions, the preclusion of access, by economically inactive Union citizens, to social welfare – specifically access to a child-raising benefit, minimum subsistence, and job-seekers' allowance, respectively - was held to be a *prima facie* breach of free movement rights. Within this framework, Union citizenship can be viewed as rights-*enhancing*, since it creates new situations through which fundamental social rights, running congruent to free movement, can be safeguarded. Not only are novel interfaces between free movement and fundamental rights

[108] Case C-85/96 *Martinez Sala*; Case C-184/99 *Grzelczyk*; Case C-138/02 *Collins*, n.2; Case C-413/99 *Baumbast*, n.53

created, but the latter benefit from free movement's structural prioritisation over the national rules that inhibit them. Access to social security is incorporated within the Union's Charter of Fundamental Rights: Article 34(2) CFR stipulates that 'everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices'. As the discussion in section three demonstrated, it is the concept of Union citizenship, combined with the right to non-discrimination under Article 18 TFEU, that obliges Member States to ensure access to social security, on an equal basis with nationals, to legally resident economically inactive Union citizens.[109] Similarly, in *Bickel*, a breach of Article 56 TFEU on services was more readily established in light of Union citizenship. Non-national service recipients in the Italian region of Bolzano were entitled to have their criminal trials heard in German, since this was available to residents of the region. Accordingly, Union citizenship bolstered the existence of a congruent relationship between free movement and the right to a fair trial, and the latter was enhanced by this dynamic since a trial is clearly fairer where it can take place in the defendant's native language. In *Carpenter*, recognition of the family needs of a service provider triggered a *prima facie* breach of Article 56 TFEU, creating an interface between free movement and the fundamental right to family life.[110] Thus, in these contexts, the increased breachability of the free movement provisions, and the consequent rise in the frequency of interactions between free movement and fundamental rights is beneficial to the latter. However, this is not as a result of their own fundamental rights status but a corollary of the architectural treatment of free movement as a fundamental right; a procedural advantage enhanced by Union citizenship's fundamentalisation of free movement.

Thus, the above analysis neglects to appreciate that, in some cases, this Union citizenship-encouraged structural bias favours the free movement and social rights of a particular individual over Member State attempts to provide a programme by which social and economic rights are available to the general population. Specifically, the increased

[109] A. Epiney also argues that Article 21 TFEU, in combination with Article 18 - the principle of non-discrimination – has significantly extended the scope of Union law and into areas where the EU lacks competence to legislate: 'neither the existence of Community competences nor their use by secondary legislation are constituent to engage the scope of the application of [Art.18(1) TFEU], according to ECJ case law. It rather bases itself significantly on the effect, the reference or the connection of a particular regularisation of the Member State with the fundamental freedoms. In other words, it does not matter whether the particular regulation itself falls within the scope of application of the Treaty, but it is decisive that the exercise of the right of free movement is regulated by the Treaty', 'The Scope of Article 12 EC: Some remarks on the Influence of European citizenship' (2007) 13(5) ELJ 611, 615-616. Although the question of legal residence can affect the application of Art.18 TFEU, Case C-333/13 *Dano*, n.5

[110] Art.8 ECHR; Art.7 CFR

breachability of the free movement provisions can result in the presentation of activity, which seeks to cater for fundamental rights, as *prima facie* wrongful behaviour where it *clashes* with free movement. For instance, in *Watts,*[111] UK rules on the reimbursement of healthcare obtained in other Member States was held to interfere with Mrs. Watts' rights, as a service recipient, to access medical services in another Member State. It was argued above that the concept of the service recipient has its origins in market citizenship and was later reinforced by a formalised Union citizenship.[112] Although complementing Mrs Watts' right to healthcare,[113] this finding of a breach of free movement also brought it into conflict with the UK's method of offering free, publicly-funded healthcare for its citizens, since a system of reimbursement is alien to a nationalised health service. Crucially, given the incongruence of reimbursement within such a structure, and its consequent potential impact on planning and budgets, the outcome of *Watts* arguably poses a threat to domestic systems that seek to ensure the fundamental right to healthcare for *all*. It was argued, for instance, in the discussion of *Watts* in chapter two, that those who are not financially or linguistically able to exploit their free movement rights to benefit from medical services abroad might suffer because those that can take advantage of this right do.[114] The requirement that a nationalised health service offers a previously unnecessary system of reimbursement for health services obtained from other service providers, inevitably necessitates the diversion of resources from elsewhere, not to mention the introduction of a new administrative burden. And yet, by channelling proportionality questions towards what is least restrictive of free movement, the two-stage breach/justification model leaves little legal space for these considerations.

Similarly, the citizenship-reinforced finding, in *Bickel*, that it was necessary to extend the possibility of having one's criminal trial proceed in German to service recipients could be viewed as posing a risk to the protection of other fundamental rights. In fact, one of the reasons given by the Italian government, for restricting this option to residents of the Bolzano region was the protection of the fundamental rights of minority groups; specifically the maintenance of the ethno-cultural identity of Bolzano's German-speaking minority.[115]

[111] Case C-372/04 *Watts* [2006] EU:C:2006:325
[112] Case C-274/96 *Bickel*, n.71, paras.15-16. It will be recalled that many of the developments discussed in this thesis cannot be viewed in isolation or as solely responsible for the structural subjugation of fundamental rights. Accordingly, ch.2, s.2.2 also discusses the impact of the introduction of the service recipient on Member State protection of fundamental social rights, focusing on the *Watts* case, as part of the discussion of the expansion of the material and personal scope of the free movement provisions.
[113] Art.35 CFR
[114] O'Brien, n.5, 1660-1661
[115] Arts.21 and 22 CFR respect the fundamental nature of this endeavour.

Crucially, Union citizenship was only able to offer a boost to the fundamental rights of the service recipients and not those of the German-speaking minority in Bolzano, since Union citizenship can only support fundamental rights as a side-effect of reinforcing free movement. Thus, the fundamental rights conflict was processed through the standard two-stage breach/justification framework, which placed the fundamental rights of minorities at a disadvantage. Moreover, Union citizenship emphasised the manifest wrongfulness of Italy's breach of EU law by highlighting the impact on the Union *citizen's* right to free movement, widening this evidentiary gap. The Court held that Italy's *prima facie* breach of free movement could not be justified because it did not appear that the extension of the right to have criminal proceedings in German to German-speakers coming from other Member States would undermine the aim of protecting minorities. While this may be true, it remains significant, more broadly, that there is limited space under the two-stage framework for the Court to assess the potential impact, or proportionality, of the pursuit of free movement on the protection of the rights of minorities. The Court simply stated that Mr. Bickel and Mr. Franz had argued 'without contradiction' that their trials could proceed in German 'without additional complication or cost'.[116] The evidential focus is on assessing whether Italy's protection of minorities is proportionate in light of the restrictions it imposes on free movement.

As the analysis of this case-law in chapter two pointed out, it was not until the Italian government expressly outlined the potentially negative effects of this extension in the subsequent case of *Rüffer* that the CJEU considered in more detail whether the protection of minorities would be hindered by the impact of a growth in German-language trials on organisation and time limits, and on costs.[117] In that case the CJEU maintained that the Italian rule could not be justified because the referring court had already acknowledged that no new organisational burdens would be created by the extension of the Italian measure to non-resident German-speakers. However, the Court also held, in relation to additional costs, that Member States could not rely on aims of a purely economic nature to justify restrictions on free movement.[118] Chapter two argued that it remains an intrinsic concern that the low evidentiary burden at the breach stage contains no obligation to consider the impact of a finding of a violation of free movement on a Member State's ability to meet its fundamental

[116] Case C-274/96 *Bickel*, n.71, para.30
[117] Case C-322/13 *Rüffer* [2014] EU:C:2014:189
[118] Paras.24-25

rights obligations. Instead, the onus is on the Member State to highlight this at the justification stage where the focus is on the proportionality of fundamental rights measures in light of the restrictions they place on free movement. Moreover, the Court's refusal, in *Rüffer*, to consider the additional costs created by expanding the beneficiaries of the Italian measure under-appreciates the budgetary considerations that are unavoidable when formulating programmes for the protection of fundamental social rights of a positive nature.

Although necessary to show solidarity and concern for the welfare of each other's nationals, cases such as *Martinez Sala, Grzelczyk,* and *Collins* also created new interfaces between the rights of the individual free mover concerned and Member State programmatic planning in relation to fundamental social rights. That is not to say that the substantive outcomes of those judgments were inappropriate. Clearly, citizenship is providing an important means by which individual EU citizens can confront discrimination and access fundamental social rights. Rather, the purpose of this analysis is simply to highlight that, in automatically favouring free movement, the procedure for reaching those decisions might leave insufficient room for the consideration of other public endeavours of fundamental importance. The Court sought to address this through the introduction of the 'real link' test, mentioned above. This requires economically inactive individuals to demonstrate, in order to access financial support, a 'real link' between themselves and the State from which they wish to receive financial support.[119] This test arguably seeks to balance the free movement rights of individuals against the practicalities of implementing programmes of social protection at domestic-level. While it can be argued that this limitation 'makes sense in the economically inactive citizenship context',[120] it also served, in *Geven* and *Hartmann* to *reduce* the breachability of the *economic* free movement provisions, 'reversing a more inclusive approach long established in the case-law on the free movement of workers'.[121] The Court has since addressed this issue in *Commission v The Netherlands*, by holding that genuine and effective work 'in principle' meets the requirements of the real link test, since migrant workers contribute to the financing of the social policies of the host State.[122] However, the use of the phrase 'in principle' leaves

[119] Case C-138/02 *Collins*, n.2, para.47; see, in relation to student loans, Case C-209/03 *Bidar*, n.56, para.24
[120] Nic Shuibhne, n.43, 182
[121] Ibid
[122] Case C-542/09 *Commission v The Netherlands* [2012] EU:C:2012:346

the door open for the real link test to restrict the fundamental social rights of Union workers in the future.[123]

More recently, the breachability of the free movement provisions was also reduced as a result of Union citizenship to the potential detriment of the fundamental right to family life of the Union citizen in *Iida*.[124] In this case, the usual cross-border test for bringing a matter within the scope of EU law was conflated with the more recent avenue for triggering Union law, introduced by the CJEU in its *Ruiz Zambrano* judgment. The 'genuine enjoyment test' brings national measures within the scope of Union law where they deprive Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status as Union citizens.[125] The threshold for establishing that an individual's circumstances involve a cross-border situation is very low. Thus, it will be recalled from chapter two that it is not necessary for the relationship between the parties to a dispute to be cross-border, if the contested Member State rules would also restrict the intra-EU movement of economic actors coming from other Member States.[126] Further, in *Garcia Avello*¸ a Member State rule could be assessed as a restriction of free movement by reference to the potential future movement of Union citizens.[127] In *Chen*, an Irish national, who had been born in the UK and had never crossed an EU border, was able to establish a cross-border element to her case by reference to her Irish nationality.[128] By contrast, increasingly, it appears that Union citizens must be *absolutely* deprived of the 'genuine enjoyment' of the rights associated with Union citizenship before EU law can be triggered through these means. For example, in both *McCarthy* and *Dereci*, the Court held that an individual would not be denied the genuine enjoyment of the

[123] Moreover, this focus on linking social security with the direct financing of social security systems arguably infuses economic activity with a moral glow, diminishing the perceived value of unpaid work. See O. Brien, n.5. Case C-333/13 *Dano*, n.5, in which the CJEU held that a host Member State was not precluded from excluding from access to special non-contributory case benefits non-national Union citizens who did not have a right of residence pursuant to Directive 2004/38, has triggered immediate questions about the exclusion from social welfare of Union citizens who do not fit neatly within the categories of residence contained in Directive 2004/38 but should also not be viewed as social tourists. For instance, the case raises questions as to the position of '*Zambrano* carers' or non-national Union citizens who entered the host State with their parents as a minor, do not have permanent residence, and require long-term assistance due to a disability: see D. Rutledge, 'Dano and the exclusion of inactive EU citizens from certain non-contributory social benefits' https://www.freemovement.org.uk/dano-and-the-exclusion-of-inactive-eu-citizens-from-certain-non-contributory-social-benefits/ (last accessed: 04/02/15)

[124] Case C-40/11 *Iida*, n.36

[125] Case C-34/09 *Ruiz Zambrano*, n.36, para.42

[126] Joined Cases C-197/11 and C-203/11 *Libert*, n.98

[127] Case C-148/02 *Garcia Avello* [2003] EU:C:2003:539. However, the broad approach to the cross-border requirement in this case could be viewed as a response to the introduction of Union citizenship itself.

[128] Case C-200/02 *Chen*, n.57 (this is not the case with a dual national holding the nationality also of the State in which she/he resides, Case C-434/09 *McCarthy v SSHD* [2011] EU:C:2011:277)

rights associated with Union citizenship unless she/he were forced to leave the Union territory.[129] The conflation of the cross-border test with the genuine enjoyment test, in *Iida*, raised the threshold for triggering the cross-border test, leading the CJEU to hold that the free movement rights of a Union citizen had not been denied since she had already crossed an intra-EU frontier without impediment to movement. The Court refused to engage with the possibility that cross-border mobility might be inhibited in the future, despite the finding in *Garcia Avello* that potential future restrictions to free movement could trigger EU law. As a result of this higher threshold, the matter did not fall within the scope of Union law and Article 21 TFEU could not be utilised to safeguard the fundamental right to family life between a Union citizen child and her third country national father. Interestingly, this conflation between the cross-border requirement and the genuine enjoyment test seems to be the result of the Court's finding in *Iida* that there is an 'intrinsic connection' between free movement and the genuine enjoyment of the rights enjoyed under citizenship.[130] Thus, the maintenance of historical and architectural ties between citizenship and free movement and their effects are manifest in *Iida*.[131]

Union citizenship has served both to increase and reduce the breachability of the free movement provisions. Where fundamental rights run *congruent* to free movement, ironically, Union citizenship has, at times, made it more difficult for individuals to establish a restriction on free movement rights. More commonly, however, in instances of *clash* between free movement and conflicting Member State fundamental rights measures, Union citizenship has increased the breachability of the free movement provisions. This has widened the evidentiary gap between establishing a breach of free movement and demonstrating justifications, under the two-stage model. This is further exacerbated by the fact the Union citizenship has also deepened the need for a strict proportionality test at the justification stage. It is to this issue that we now turn.

4.2. Exacerbating the uphill struggle: reducing opportunity for justifying a breach of free movement

[129] Ibid, para.50; Case C-256/11 *Dereci a.o. v Bundesministerium für Inneres* [2011] EU:C:2011:734, para.68
[130] Case C-40/11 *Iida*, n.36, para.72
[131] Reynolds, n.40

As section three outlined, Union citizenship appears to require the use of higher evidentiary hurdles at the justification stage, since activity in breach of the free movement provisions restricts the fundamental free movement rights of the Union citizen. Thus, as will be recalled, in *Orfanopoulos*, the Court stated that a 'particularly restrictive' interpretation of derogations from free movement was required by virtue of a person's status as a Union citizen.

The *Libert* case demonstrates the potential effects of a particularly restrictive approach to justifications on a Member State's ability to safeguard fundamental social rights.[132] It was outlined above that, a Flemish Decree, which required potential buyers/tenants of property to demonstrate a 'sufficient connection' to certain communes before they could buy property there, or rent it on a long-term lease, was found to be a restriction of Articles 21, 45, 49, 56, and 63 TFEU. It was argued earlier that the effects of the rule upon the Union citizen contributed, to a greater or lesser extent, to this finding. Moreover, it was also posited that the Court's grouping of all of these free movement provisions together at the justification stage could transfer the higher evidentiary hurdles operating within citizenship into the market freedoms. The Flemish Government contended that the 'sufficient connection' requirement was justified, *inter alia*, by the need to guarantee sufficient housing for low-income or otherwise disadvantaged members of the population. Accordingly, its justification lay in the fact that the measure sought to secure access to housing, a right recognised as fundamental by Article 34 CFR. The CJEU accepted that this was permissible in principle but, as required by the two-stage approach, proceeded to conduct a strict proportionality assessment to ascertain whether the measure was justifiable in practice by reference to whether there were alternatives available that would be less restrictive of free movement. In fact, the Court evaluated whether the actions of the Flemish Government were 'necessary' and 'appropriate' with even more rigour than usual. For instance, the Court noted that the conditions put in place by the Flemish Government for establishing a 'sufficient connection' to the relevant commune would not be *exclusively* met by the less affluent population. People other than those on a low-income could meet the criteria. Accordingly, the Flemish measure went beyond what was necessary to obtain the objective pursued. The Court proceeded to provide very prescriptive guidance on *how* Member States could protect disadvantaged families whilst still respecting free movement rights. It suggested that '[p]rovision could, for example, be made for subsidies for

[132] Joined Cases C-197/11 and C-203/11 *Libert*, n.98

purchase or other subsidy mechanisms specifically designed to assist less affluent persons…'.[133]

This guidance is arguably questionable from a fundamental rights perspective. Specifically, as detailed in chapter two when discussing the trio of fundamental rights impact that the two-stage approach creates, it does not consider the practical aspects, faced by a State when meeting its obligations to its citizens.[134] For instance, the 'sufficient connection' test is negative in character and therefore likely to be low-cost. By contrast, the Court's proposed alternative is more positive in nature. Since proportionality is viewed through a free movement lens, there is no consideration of whether the Flemish Government, with its finite resources, will be able to offer such a mechanism. It is sufficient that measures less restrictive of free movement exist in principle. There is no analysis of the possibility that, if the scheme is not workable from a financial or logistical point of view, protection for low-income families might be abandoned altogether. In other words, as has already been demonstrated in relation to *Watts* and *Bickel*, there is no examination, under the two-stage model, of whether free movement is being pursued in a way that is least restrictive of programmatic fundamental rights, which often encompass complex decisions of policy requiring considerations of practical effectiveness and financial and administrative cost. This is arguably exacerbated by the need for a 'particularly restrictive' approach to derogations following the formalisation of Union citizenship.

Some might question whether the Court's prescriptiveness in *Libert* was the result of the particular political and factual background to the case, and also query the negative effects of subsidy schemes on programmes of social protection in relatively wealthy regions such as Flanders. Indeed, Advocate General Mazák acknowledged the argument that the 'sufficient connection' test might exist not to secure access to housing but rather to preserve the Flemish nature of the population of the target communes.[135] And yet, the Advocate General explicitly stated that such a reason could not constitute an overriding reason in the public interest, even

[133] Para.156
[134] Ch.2, s.3.3.4. The discussion in that chapter focused on the maintenance of a strict proportionality test after the definition of a breach of free movement evolved beyond direct discrimination and its subsequent impact on fundamental rights. The analysis, here, centres on citizenship's contributions in this regard. This is accordingly an example of the interlocking nature of these constitutional developments in the formation or exacerbation of a structural preference for free movement over fundamental rights.
[135] Joined Cases C-197/11 and C-203/11 *Libert* [2013] EU:C:2012:621, para.34

in principle.[136] He then proceeded to assess whether the restrictions imposed by the Flemish Decree could be justified in light of the legitimate aim of 'meeting the accommodation requirements of the less affluent endogenous population'.[137] It was in this assessment that Advocate General Mazák provided the very prescriptive guidance on how Flanders might pursue this goal, later largely adopted by the Court. Moreover, while less prescriptive, and leaving the final application to the national court, the CJEU's assessment of another provision of the same Flemish instrument, which required land developers to make a certain number of housing units available for social housing or make payment in kind, exposed that provision to the same proportionality hurdles. And yet, this 'social obligation' provides a relatively cheap way of adding to the local housing stock, and therefore of implementing the right to access to housing. Thus, the *Libert* case, like *Bickel* and *Watts*, is an example of a broader issue concerning whether the Court is a suitable locus for the complex decisions of policy that accompany the designing of programmes of social protection. This is especially true when the Court's two-stage approach concentrates the analysis on what is least restrictive of free movement, with little legal space for considerations of the practicalities of policy design or the balancing of Member State budgets.

As well as encouraging a more prescriptive approach in relation to whether measures are 'necessary' to meet the fundamental rights goals of the Member States, it is submitted that Union citizenship has contributed to a stricter approach to proportionality in a more general sense. Following the *Baumbast* ruling,[138] which exposed Member State decisions to deport individuals to a proportionality assessment even where those individuals did not meet the clear residence requirements laid down in (what is now) Directive 2004/38, Dougan postulated that this more stringent use of proportionality, inspired by Union citizenship, might be extended to cover other conditions attached to the exercise of economic activity.[139] For instance, he argued that Member State implementation of Article 3(1)(c) of the Posted Workers' Directive (PWD)[140] might be exposed to questions of proportionality. This provision obliges Member States to apply domestic rules on minimum pay to non-national undertakings who, in exercising their freedom to provide services, have posted their own

[136] Ibid
[137] Para.35
[138] Case C-413/99 *Baumbast*, n.53
[139] M. Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship', (2006) 31(5) ELRev 613, 613, 618, and 636.
[140] Directive 96/71/EC of the European Parliament and Council of 16 December 1996 concerning the posting of workers in the framework of the provisions of services (OJ 1997 L18/1)

employees to the host State. Dougan speculated as to whether, subsequent to the *Baumbast* ruling, a host Member State could nevertheless be found to be in breach of Article 56 TFEU on the freedom to provide services because, on occasion, requiring the payment of minimum wage to workers might be viewed as a disproportionate interference with that provision of primary law.[141] This would clearly impact on the ability of both national and Union legislators to enact legislation that aims to mitigate the impact of free movement on other important endeavours, such as social equality and fundamental rights.

These concerns were partially realised in *Commission v Luxembourg*.[142] This case concerned a wage index that took the cost of living into account with regard to *all* wage categories. Although, the Commission and the Court both accepted that the indexing of *minimum* wage to the cost of living fell within Article 3(1)(c), the Commission challenged the fact that the indexation applied to all wage categories. Luxembourg argued that this also fell within Article 3(1)(c). This argument was rejected by the Court. In light of the fact that rates of pay were adjusted due to the cost of living, however, the index could be viewed as imposing minimum amounts for differing roles in different geographical areas. Next, Luxembourg submitted that, because the purpose of the index was to ensure good labour relations and protect workers from the effects of inflation, it fell within Article 3(10) PWD. This provision allowed host States to impose terms and conditions of employment on employers, beyond those found within the Directive itself, for reasons of public policy. However, the Court read Article 3(10) as a derogation from the fundamental freedom to provide services and consequently required that it be interpreted strictly. Luxembourg's wage index was found to constitute a breach of Article 56 TFEU, which could not be justified by reference to worker protection.[143]

The situation in *Commission v Luxembourg* is not as clear-cut as the example provided by Dougan. Evidently, Article 3(10) is not a clearly worded provision of secondary legislation the application of which has, nevertheless, been subject to a strict proportionality assessment. Rather, it provides the Member States with the capacity to go above and beyond the clearer stipulations found within the PWD itself, where public policy requires it. However, Dougan's speculation that the citizenship-based *Baumbast* ruling could have wider implications for the

[141] Prior to the coming into force of the PWD, the Court had already imposed a proportionality test in relation to minimum pay in Case C-165/98 *Mazzoleni* [2001] EU:C:2001:162
[142] Case C-319/06 *Commission v Luxembourg* [2008] EU:C:2008:350
[143] The disparity in the evidential burden faced at the breach and justification stages, in terms of the evidence that Luxembourg had to present to demonstrate that its measures tackled the effects of inflation upon the worker, are discussed in ch.2, s.3.3.1.

economic free movement provisions has been realised to some extent. Recalling the discussion of this case in chapter three, prior to the cases of *Laval*,[144] *Rüffert*[145] and *Commission v Luxembourg*, the PWD was largely viewed as an anti-social dumping measure, targeted at preventing service providers from competing on cost in a host State by relying on the lower standards of social protection applicable within home State systems.[146] The Court's application of the principle of proportionality in *Commission v Luxembourg* is in direct contrast with this original purpose. The proportionality test focuses exclusively on the impact on free movement of national measures targeted at protecting workers. It does not consider the consequences for worker protection of the finding of a breach of free movement. Thus, the two-stage approach, boosted by Union citizenship, favours the free movement of the service provider over Member State efforts to secure the fundamental social rights of the worker.[147]

The *Rüffert* decision offers another example in this regard.[148] In that case, the PWD was also interpreted in a way that appears contradictory to its initial aims. Prior to *Laval*[149] and *Rüffert*, Article 3(7) PWD, which stipulates that the core nucleus of terms and conditions featured in Article 3(1)(a)-(g) shall not prevent the application of terms of employment which are more favourable to workers, was thought to present the core nucleus as a 'floor' of protection for Member State workers.[150] However, in *Rüffert*, a German law, obliging public authorities to require their private contractors to pay their workers the minimum wage laid down in local collective agreements (and therefore going beyond the mandatory minimum wage contained in law) was held to be a breach of Article 56 TFEU. Article 3(7) PWD was interpreted simply as permitting terms and conditions, coming from the service provider's Member State of *origin*, which were more favourable to the worker, to continue to apply in the posting context.

Thus, although Union citizenship can be seen as bringing a legitimate, material dimension to the interpretative process – through the recognition of the personal, fundamental status of the

[144] Case C-341/05 *Laval*, n.90
[145] Case C-346/06 *Rüffert* [2008] EU:C:2008:189
[146] Ch.3, s.2.2. See for instance the accompanying text to the initial legislative document COD/1991/0346, 28/06/1991, 'L*es entreprises non nationales seront ainsi mise à égalité avec les entreprises nationale*'; EP Decision of the Committee Responsible, 2nd reading, COD/1991/0346, 24/07/1996, 'The aim is to eliminate unfair competition by ensuring that "posted" workers do not receive lower wages and are not subject to less favourable working conditions in the member state concerned'.
[147] Art.31 CFR recognises a right to fair and just working conditions.
[148] Case C-346/06 *Rüffert*, n.145
[149] Case C-341/05 *Laval*, n.90
[150] For general discussion see C. Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform' in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, (2nd edition, OUP 2011), ch.21, 668.

Union citizen - that both widens the concept of breach and restricts the notion of justification, this is only beneficial to fundamental rights when they run congruent to free movement, for instance in cases like *Carpenter*. Union citizenship currently has little to offer those fundamental rights that conflict with free movement, since it can only assist citizens' fundamental rights as a side-effect of its structural support for free movement. Indeed, as the above case-law demonstrates, citizenship's entrenchment of the two-stage model, which often brings Union law into areas where the Union lacks legislative competence, can also undermine a Member State's ability to protect fundamental social rights in instances of clash. Thus, Wollenschläger has remarked that, while the market freedoms had already curtailed the regulatory autonomy of the Member States, a general right to free movement 'can only further boost such a dynamic'.[151]

This introduces wider questions about the current challenges facing Union citizenship but also recalls broader issues, which run through this thesis as a whole, about how the competing objectives within the Treaty can be balanced against each other, especially when the Treaty foresees the pursuit of these goals at different levels, either the national or supranational. Where the Treaty leaves it to the Member States, for instance, to attain certain social aims, there needs to be sufficient legal space for the Member States to perform these functions domestically without this being challenged as a *prima facie* unlawful restriction of the free movement provisions. Accordingly, our final section re-frames the discussion and presents Union citizenship as a case-study offering an overview of these wider themes. This provides foundations for the analysis in chapter five of an alternative method of adjudication that, it will be argued, is better equipped to offer the legal room required to consider the Union's diverse and conflicting goals.

5. Moving beyond the legacy of market citizenship: ongoing challenges for Union citizenship

The above sections have demonstrated the existence of a paradox within Union citizenship. Emerging from a market citizenship, a formalised Union citizenship has utilised the basic legal structures of the internal market and adopted, as the core right of the Union citizen, the

[151] Wollenschläger, n.26, 15

freedom to move and reside freely in the territory of the Member States. By attaching free movement to the personal status of the Union citizen, Union citizenship has been able to secure access to fundamental social rights for a wider range of individuals. And yet, it is this very personalisation of free movement that has contributed to the elevation of free movement, also in the *economic* context, to a fundamental right, encouraging the structural prioritisation of free movement over (other) competing programmatic fundamental rights.

However, this paradox is not unique to Union citizenship. In the wider context of citizenship, the term 'citizen' has historically served as a symbol of equality, casting off the inequalities of aristocratic titles and personal subservience. This notion of equality complemented liberal economics and capitalism. As Heater notes, 'the free exercise of individual initiative is the very essence of capitalism… Initiative required the partitions between social class to be permeable. The concept of citizenship took this to the logical conclusion of equality of status. A citizen is a citizen is a citizen: no differentiation'.[152] However, 'lurking behind [this] is the counterbalancing economic inequality induced by unfettered capitalism'.[153] In short, 'capitalism weakens [the] egalitarian political structure [upon which it is based] by giving primacy to economic relationships. New class divisions open up, separating the wealthy entrepreneurs from the general populace, a gulf condoned by the liberal virtue of individual enterprise'.[154] For Marshall, the way to address this new inequality was to embrace the *social* elements of citizenship.[155] According to him, citizenship required equal social worth, not merely equal natural rights.[156] For instance, the provision of a welfare state 'is necessary to raise the relatively poor to a condition in which they can enjoy the citizenly condition of full autonomy, freedom and participation'. Nevertheless, this, itself, results in paradox. Adding a social element to civic and political citizenship often necessitates the favouring of the community over certain freedoms of the individual. For instance, the funding, from taxation, of social housing and free education would impinge on an individual's ability to reap fully the rewards of her/his individual initiative. Having previously complemented capitalism, the call, under citizenship, for a *fuller* equality challenges the development of a socially unequal capitalism. Macedo, however, has argued that this paradox can, in fact, be addressed through liberalism itself. While liberalism focuses on the freedom of the individual, this does not

[152] D. Heater, *What is Citizenship?* (Wiley, 2013), 8-10
[153] Ibid
[154] Ibid
[155] T. Marshall, *Citizenship and Social Class*, (Pluto, 1992 - re-issue, T. Bottomore (ed)), 20-21
[156] Ibid, 24

equate to a 'free-for-all'. It instead requires the moral qualities of 'tolerance, self-criticism, moderation, and a reasonable degree of engagement in the activities of citizenship'.[157] As Heater summarises:

> …the liberal citizen understands and accepts the plurality of society, a condition that demands toleration, lest society plunge into communal or civil discord… People as individuals or as groups are different, but they are all fellow citizens and should be respected as such.[158]

This admittedly brief consideration of the wider citizenship discourse illustrates some of the challenges facing Union citizenship in its current stage of development as outlined in this chapter. Although Union citizenship has already achieved more, for a wider range of Union citizens, than its initial critics might have expected,[159] it is only able to do this by strengthening the constitutional significance of free movement. Since free movement is not a 'neutral…selective tool',[160] there is the danger that, as with earlier forms of citizenship, primacy will be given to economic relationships over making programmatic provision for the fundamental social rights of wider societal groups. The breadth and strength of free movement, partly bolstered by Union citizenship, can reconceptualise domestic policies adopted with the aim of improving levels of social protection into an issue of a breach of free movement law. Moreover, as we reflected in chapter one, this might not reflect the Union's own commitment to social advancement, or the clustering of Treaty social provisions around shared and complementary competence.[161]

Thus, Union citizenship is at a cross-roads. The real challenge it faces is how best to reflect and cater for the (at times conflicting) fundamental rights needs of *all* Union citizens, including those who do not move. Indeed, if programmatic fundamental social rights increasingly trigger supranational concerns, then Union citizenship might require that they be taken seriously at Union-level. But, at the very least, Union citizenship should not be used as a tool by which market integration can diminish efforts to promote fundamental social rights, such as the right to health, education, fair working conditions, or broader solidarity rights, at

[157] S. Macedo, *Liberal Virtues: Citizenship, Virtue and Community and Liberal Constitutionalism*, (Clarendon, 1992)
[158] N.152
[159] S. O'Leary notes that the CJEU has interpreted the provisions of Union citizenship in a way that can be said to 'explode the linkages' between the right to move and reside freely within the Union and economic activity, 'Putting Flesh on the Bones of European Union Citizenship' (1999) 24 ELRev 68, 77-78
[160] O'Brien, n.5, 1660
[161] Ch.1, s.4.3.2; Arts.3, 4 and 6 TFEU

national-level. The question now, therefore, is where the line should be drawn. For instance, Union citizenship might seek to find a way to progress beyond its historical, market-focused beginnings and detach itself from free movement, so as to recognise better the diversity of Union citizens across Europe. A more social form of Union citizenship could be used to mainstream the variety of fundamental rights concerns into Union law and policy including into the definition of free movement. This might also, arguably, lead to a more efficient internal market. In the context of labour law, for instance, commentators have recognised the need for worker voice, through the fundamental rights of participation and representation, in order to increase efficiency and wealth maximisation: 'such rights [also] enhance the concept of European citizenship by providing a new forum of decision-making which is normally ignored in the debates regarding the democratic deficit: the European common market'.[162] Alternatively, we might ask whether, for the time being at least, Union citizenship should develop, through its central tenet of equality, so as to ensure, as a minimum, that market integration is more respectful of Member State efforts to implement programmatic fundamental rights.

The debates taking place within citizenship reflect the same dilemma occurring within the Union's broader constitutional framework. As chapter one emphasised, although the Union is built on economic foundations, its contemporary goals are much broader.[163] The European Economic Community has evolved into a European Union, signalling political as well as economic integration. The Treaties now cover broad policy fields from the internal market to common foreign and security policy;[164] justice and home affairs, including asylum and immigration and judicial cooperation in civil and criminal matters;[165] social policy;[166] education;[167] and public health.[168] The Treaties also make a specific commitment to the protection of fundamental rights and give primary law status to the Charter, which contains not only civil and political rights, but also economic, social, and solidarity rights.[169] And yet, it will also be recalled from chapter one, that the Treaties divide labour, for pursuing these diverse areas of policy, between the Union and the Member States. Thus, in some fields,

[162] M. Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in P. Alston et al (eds), *The EU and Human Rights*, (OUP, 1999), 449, 470
[163] Ch.1, s.4.3.2.1
[164] TEU, Title V
[165] TFEU, Title V
[166] TFEU, Title X
[167] TFEU, Title XII
[168] TFEU, Title XIV
[169] Art.6(1) TEU

where the Union only has shared or complementary competence, such as social, health or educational policy,[170] the Member States can be viewed as the principal 'agents' for attaining contemporary Union goals.[171] A two-stage approach, which pits free movement *against* domestic fundamental rights measures, presenting the latter as *prima facie* restrictions of EU law, accordingly does not always accurately encapsulate the contemporary constitutional framework.

In this way, the same historical analysis of the concept of citizenship can be applied to the European Union as a whole. As Maduro has remarked:

> Promotion of economic integration through free trade is understood to increase efficiency and wealth maximisation. However, many fear that such gains may occur at the cost of weaker social groups or are not fairly distributed between all members of society. Underlying this discussion is the old conflict between efficiency and distributive justice or, in other words, between promoting competitiveness and wealth maximisation and securing a certain degree of social protection to all members of the community.[172]

Since free movement has expanded to interact with a wide range of domestic policy, 'the balance between economic freedom and social rights in the European Economic Constitution has largely been defined by the balance between market integration and national social rights'; between the acceptable degree of restriction on trade and the level of market regulation.[173] However, since the Union is built on an economic constitution 'the development of social rights appears to be a prisoner to the values of market integration and not the consequence of a political conception of the social and economic protection deserved by any European citizen'.[174] Thus, even if normatively, free movement does not exist to challenge fundamental rights or social standards, it does expose national attempts to secure them to competition.[175] Moreover, as we have seen, many areas of State regulation, aimed at protecting rights such as education, health, social protection, and fair and just working conditions, are recognised in the Treaties as goals of the Union[176] but cluster around shared or

[170] Arts.3, 4 and 6 TFEU
[171] That is not to say that the Treaty confers legislative competence in these fields on the Member States, it is the Union, itself, which is built on powers conferred from the Member States. The presentation of the Member States as 'agents' simply seeks to emphasise that Member State policy, which might restrict free movement, can be viewed as complementing other objectives within the Treaty.
[172] N.162, 465
[173] N.162, 450-453
[174] N.162, 455
[175] N.162, 467
[176] N.162, 471

complementary competence. This has led Maduro to argue that 'the relationship between the fundamental rights arising from the free movement rules and the classical economic and social fundamental rights has to be clarified'.[177] On the one hand, this could provoke the argument that European social policy should be developed to reintroduce political control over the economic sphere at Union-level.[178] However, if the Union cannot, due to constitutional or political limitations, act to secure the protection of fundamental social rights, then, at the very least, it needs to be able to 'back off' where appropriate, leaving Member States with sufficient legal space to enact and implement fundamental rights measures away from the shadow of a breach of free movement law. It is submitted here, that this is not possible when the Court of Justice adopts a two-stage approach to tensions between free movement and fundamental rights that procedurally presents the latter as *prima facie* wrongful under Union law, exposing fundamental rights to proportionality questions not faced by free movement. Accordingly, it will be the task of the next chapter to identify a new adjudicative approach to addressing tensions between free movement and fundamental rights, which better reflects the Union's own contemporary constitutional framework and creates more legal room for fundamental rights considerations.

6. Conclusion

Union citizenship is borne from, and built upon, the internal market. It has adopted, as its core right, the freedom to move and reside within the territory of the Member States. This has infused free movement, in both the personal and economic spheres, with a fundamental quality, since Union citizenship attaches to the *personal* status of the individual. This has legitimised the use of a structural bias that procedurally favours free movement over conflicting activity, treating the former as a *fundamental right*. Union citizenship has also brought the free movement provisions into more frequent contact with domestic fundamental rights norms. Where fundamental rights run *congruent* to free movement, this can enhance the fundamental rights of the Union citizen. However, where free movement clashes with fundamental rights, Union citizenship is not only unable to assist individuals, but, in fact, serves to undermine programmatic protection of fundamental rights at national-level, since its structural reinforcement remains attached to the exercise of free movement. This raises

[177] N.162, 463
[178] N.162, 467

fundamental questions about the contemporary challenges facing Union citizenship, reflecting dilemmas within the broader constitutional framework of the Union. Through its continuing attachment to movement, Union citizenship is not only limited in its ability to progress beyond market citizenship, but also in its capacity to cater fully for the diverse and conflicting fundamental rights issues taking place in free movement disputes. A pertinent task for Union citizenship, therefore, is to evolve in a way that allows the needs of non-movers to be taken more seriously at European-level, or, at the very least, to ensure that it does not operate to *undermine* any Member State attempts to deal with this concern. Consequently, although Union citizenship and the EU's economic roots can be viewed as historical factors in the entrenchment of the structurally imbalanced two-stage approach, the evolution of EU citizenship, and the Union's contemporary constitutional framework, can also be viewed as drivers of adjudicative change. This introduces the new question, addressed in the next chapter, of whether there is an alternative to the breach/justification framework that better accommodates the present-day objectives of the Union.

Chapter Five

RESETTING THE SCALES: A NEW MODEL FOR ADJUDICATING INTERACTIONS BETWEEN FREE MOVEMENT AND FUNDAMENTAL RIGHTS

1. Introduction

Previous chapters have demonstrated the existence of a two-stage breach/justification procedure for adjudicating tensions between free movement and fundamental rights that prioritises the former over the latter, treating free movement as *more* fundamental than fundamental rights. A trinity of constitutional developments, covering the expansion of a breach of free movement beyond instances of discrimination, the introduction of the doctrine of direct effect, and the development of Union citizenship, have simultaneously increased the volume of interactions between free movement and fundamental rights and reinforced this two-stage approach. However, it has also been established that the two-stage methodology does not adequately reflect the Union's contemporary constitutional framework. Specifically, its presentation of fundamental rights as a *prima facie* wrong in need of justification does not encapsulate the Union's own explicit commitment to respecting fundamental rights, most recently strengthened at Lisbon by the conferral of primary law status on the Charter and the introduction of a Treaty obligation to accede to the ECHR.

The Union's present-day aims are also broader than economic integration, although there is a lack of uniformity in the Union's approach to its new goals. In several areas, that cannot be cleanly delineated from free movement, such as social policy, the Treaty opts to respect the diversity of the Member States and make them agents in the pursuit of these objectives as a result of the limits of the Union's own legislative competence. And yet, the two-stage methodology still presents Member State policy, targeted at securing goals that the Union itself views as legitimate, as *prima facie* unlawful where they impose restrictions on free movement. This limits the legal space in which the Member States can safeguard fundamental rights since their permissibility is assessed by reference to whether there are means of protecting fundamental rights that are less restrictive of free movement. This can lead to a trio of negative impact in terms of fundamental rights protection. Specifically, previous chapters

have demonstrated that this one-sided proportionality assessment can under-appreciate the idiosyncratic fundamental rights needs of the still diverse Member States; neglect to consider the inherently restrictive effects of certain fundamental rights, such as the right to strike; or result in proposals for alternative means of fundamental rights protection that might not be feasible, for example from administrative or financial points of view.[1]

The conclusion that the historically-entrenched breach/justification framework is ill-suited to the Union's contemporary constitutional framework inevitably introduces the question of whether there exists an alternative adjudicative methodology that would better accommodate fundamental rights considerations, whilst still conforming to the Treaty's constitutional requirements. This chapter will argue that the use of a rights-*balancing* model meets these conditions. Accordingly, section two will examine the increased use of rights-balancing, through the use of *reciprocal* proportionality assessments in the context of rights clashes occurring at the level of EU secondary law. Looking further afield, and in light of the requirement contained in the Lisbon Treaty that the EU accede to the ECHR, the section also surveys the utilisation of rights-balancing by the ECtHR to resolve tensions between conflicting Convention rights.

Section three argues that a rights-balancing framework, focused on *mutual* impact assessment, should be adopted in the increasing instances of conflict between the free movement provisions and fundamental rights. Rather than viewing fundamental rights as *prima facie* wrongful breaches of free movement and consequently searching for outcomes that are least restrictive of the latter norms, a rights-balancing model treats free movement and fundamental rights as hierarchically equal. Although, for constitutional reasons, a balancing framework will still consist of two-stages, the potential for procedural disadvantage within such an approach will be neutralised by the use of a *reciprocal* proportionality assessment, triggered by the presence of fundamental rights concerns. This requires not only that the impact of fundamental rights on free movement is assessed, but also that the impact of free movement on fundamental rights is examined. The model then strives for an outcome that is least restrictive of *both* free movement and fundamental rights. Although this will, therefore, admittedly, still require alterations, at times, to domestic fundamental rights approaches, in light of the Member States' commitment to European integration, such changes carry less risk

[1] See, in particular, ch.2, s.3.3

of a *reduction* in fundamental rights standards in real terms. In seeking compromise, measures that are less restrictive of free movement may be rejected for approaches that still achieve the core goals of free movement but are also respectful of fundamental rights and the complexities inherent in their protection. This will require the Court to take an holistic approach to the Treaty, respecting its contemporary aims, and the decisions of its drafters to leave the pursuit of certain goals to the Member States.

Section four then acknowledges and addresses the conceptual challenge that arises from treating free movement, under a balancing model, as the same as, or at least equal to, fundamental rights. Drawing on the undeniable constitutional significance of free movement, not only to the internal market but to broader goals of the Union and the rights of the Union citizen, the section will argue that free movement should be recognised as a fundamental right within the EU legal order, or, at the very least, as a constitutional norm of equal rank to fundamental rights.

2. Exploring balancing as an alternative approach to clashes between norms: lessons from the ECHR and EU secondary law

The focus on the use of balancing by the ECtHR and by the CJEU in the context of rights clashes at the level of secondary law is pertinent because of the increased significance of both the ECHR and the Charter to the EU's constitutional framework, post-Lisbon. Admittedly, the ECtHR and the CJEU have very different tasks. The former is focused on ascertaining whether Contracting Parties have met a minimum standard of protection in relation to the fundamental rights laid down in the Convention. This permits Contracting Parties the legal space for culturally or socially-influenced moral choices above this floor. Convention rights do not formally enjoy supremacy or direct effect within the national legal orders and the Strasbourg Court's decisions are only binding between the parties to the dispute.[2] The ECtHR does not claim that the creation of the ECHR entailed a transfer of the sovereign powers of the Contracting Parties.[3] By contrast, the CJEU has famously held that the Union constitutes a

[2] Art.46 ECHR
[3] See in relation to this general summary, J. Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine', (2011) 17(1) ELJ 80, 102

new legal order entailing some limitation on the sovereign rights on the Member States.[4] The constitutional remit of the EU is also much broader than the Convention, covering varying policy fields.[5] Provisions of EU law have primacy over national law and may be directly effective.[6] Moreover, in order to secure the attainment of the internal market, Member State rules must comply with Union law even where they fall within areas of Member State legislative competence,[7] and derogations from Union law cannot be determined unilaterally by the Member States.[8] Accordingly, the Court has at times found that EU law imposes a ceiling on Member State policy choices.[9] Nevertheless, as Gerards has argued, there are important and relevant similarities between the ECtHR and the EU Courts. She notes that in practice, the Convention increasingly forms part and parcel of the national legal order; that the impact of the ECtHR's case-law reaches far beyond the case at hand; and that by imposing positive obligations on Contracting Parties, the ECtHR has influenced national law and policy with increasing directness.[10] Further, since the Treaty obliges the Union formally to accede to the ECHR, it would seem appropriate, in order to minimise the chances of conflict between the pursuit of free movement and the Union's future direct obligations under the Convention, for the Luxembourg Court to streamline its adjudicative models.[11] Of course, that is not to say that the ECtHR's judicial methodologies are without criticism. There is an extensive academic literature in this regard.[12] Nevertheless, consideration of the processing of fundamental rights conflicts by the Strasbourg Court offers a useful counterpoint to the current methodology of the CJEU and allows us to explore those aspects of alternative models that might prove beneficial within the Union's contemporary constitutional environment. Moreover, as will be explored in greater detail below, there is evidence of an emerging receptivity to balancing within the case-law of the CJEU and the Opinions of its Advocates General in the context of free movement/fundamental rights conflict.

[4] Case 26/62 *Van Gen den Loos* [1963] EU:C:1963:1; see also *Opinion 2/13* [2014] EU:C:2014:2454, para.157
[5] See ch.1, s.4.3.2.1
[6] Case 26/62 *Van Gend*, ibid; Case 6/64 *Costa* [1964] EU:C:1964:66
[7] Case C-438/05 *Viking* [2007] EU:C:2007:772, para.40
[8] Case C-36/02 *Omega* [2004] EU:C:2004:614, para.30
[9] Case C-341/05 *Laval* [2007] EU:C:2007:809
[10] Gerards, n.3, 103
[11] Although the CJEU's focus on the unique nature of the Union legal order and its rejection of the draft agreement on EU accession to the ECHR in *Opinion 2/13* (n.4) not only pushes back formal accession to the Convention but also suggests that the CJEU would not consider such streamlining to be appropriate where the interpretation of fundamental rights must be in line with the framework of the objectives and structure of the EU, para.170. Nevertheless, it will be recalled from ch.1 that accession to the ECHR is only one example of a wider problem relating to the constitutional (in)appropriateness of the current two-stage breach/justification methodology.
[12] For an overview, see G. Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26(4) OJLS 705, 705-706

2.1. Adjudicating conflict between fundamental rights through mutual impact assessment: the approach of the ECtHR

At times the European Court of Human Rights has been tasked with addressing tensions between two competing fundamental rights. This occurs when a Contracting Party to the ECHR is accused of interfering with a Convention right and argues that its actions sought to safeguard a second fundamental right. In such situations, though the Strasbourg Court still processes the dispute through a two-stage interference/justification framework, the presence of a conflicting fundamental right triggers a new kind of proportionality test. The Strasbourg Court conducts a mutual impact assessment, in order to determine which fundamental right have been affected the most, and strives for balance in relation to the protection of competing rights. This new *reciprocal* proportionality test arguably neutralises the *prima facie* wrongfulness implicit in the finding of an interference with a Convention right since *both* fundamental rights face proportionality questions before the Court makes its final decision.

In order to explain this process more clearly, we will examine two ECtHR cases concerning fundamental rights conflicts. The first, *Kokkinakis*, involves a conflict between the religious freedom of an individual citizen, protected by Article 9 ECHR, and the competing religious freedom of the general population of Greece. The second, *Kutzner*, sees Germany argue that its interference with the family life of a German couple is warranted by the need to protect the rights of the child.

In *Kokkinakis*,[13] Mr. Kokkanikis had called at the home of Mrs. Kyriakaki and, having gained entry, had talked about his beliefs as a Jehovah's Witness. In relation to this, he was later found guilty of proselytism, which was prohibited by Article 13(2) of the Greek Constitution and defined in an implementing law as, *inter alia*, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion with the aim of undermining those beliefs through moral or material support, fraud, or by taking advantage of her/his low intellect or naïvety. Mr. Kokkinakis brought an action before the ECtHR alleging, *inter alia*, that his Article 9 ECHR rights had been violated by Greek law. He argued that it was legally and logically difficult to draw a line between proselytism and the freedom to

[13] *Kokkinakis v Greece*, App.No:14307/88

change one's beliefs and manifest one's religion in the form of teaching. The Greek Government argued that the practice and expression of all religious beliefs was permitted in Greece but this was different from using deceitful and immoral means, such as exploiting destitution and low intellect, to secure conversion.

In defining the scope of Article 9, the ECtHR outlined that religious freedom encompassed the right to manifest one's religion, including, in principle, the right to try to convince others through teaching.[14] However, it noted, in addition, that Article 9 also covered protection for the beliefs of others.[15] Nevertheless, an interference with Mr. Kokkinakis' freedom of religion was established automatically by virtue of his imprisonment. The ECtHR proceeded, therefore, almost immediately to the question of justification.[16] Thus far, the Strasbourg Court's adjudicative approach appears to favour Mr Kokkanikis' religious freedom over the religious freedom of others. However, at the 'necessity' stage of the proportionality assessment, the ECtHR emphasised the need to *weigh* the requirements of the protection of the rights of others against the conduct of the applicant.[17] In other words, rather than requiring the Greek rules to overcome the standard justificatory hurdles, usually applied to public interests, of the 'strict' interpretation of a pressing social need that was 'compelling and convincing', it was necessary to *reconcile* the right of religious individuals to bear witness and the need to protect the freedom of conscience of others, especially those in distress or need, from 'improper pressure…violence or brainwashing'.[18] The ECtHR concluded that the focus of the Greek law on *improper* proselytising adequately reconciled these competing needs. However, by simply repeating the wording of the Greek implementing law to find Mr. Kokkinakis liable, without conducting a thorough assessment on the facts, the domestic courts had not sufficiently demonstrated that his actions had been 'improper'. Accordingly, the consequences for Mr. Kokkinakis' religious freedom appeared to be greater than the impact of his activities on the Article 9 rights of others. He had been imprisoned, whereas there was no established interference with the religious freedoms of others at all.

Although the presence of a competing Convention right triggers a different, *reciprocal* proportionality assessment at the justification stage, the dissenting opinions of Judges Foighel and Loizou suggest a concern, within the Strasbourg Court, regarding a residual inherent

[14] Para.31
[15] Para.33
[16] Para.36
[17] Para.47
[18] Para.48

preference for the Article 9 rights of Mr. Kokkinakis as part of the *two-stage* model. Reaching a different outcome, due to their interpretation of the facts, Judges Foighel and Loizou stress that an interference with Article 9(1) ECHR should itself be defined by reference to the religious freedoms of others, as part of a simultaneous, one-stage assessment.

Both approaches in *Kokkanikis* demonstrate an understanding, by the Strasbourg Court, that a proportionality assessment, which seeks to find an outcome that is least restrictive of the rights of the individual litigant, is ill-suited to a direct conflict between two Convention rights. Instead, it conducts a mutually reflexive consideration of the relative impacts of protecting conflicting Convention rights on *each other*. The Strasbourg Court then offers protection to the right that is restricted the most in the final analysis.

In *Kutzner*,[19] Mr. and Mrs. Kutzner, who had special educational needs, alleged, *inter alia*, that the withdrawal, by the German State, of their parental responsibility for their daughters, was a violation of their right to family life, pursuant to Article 8 ECHR. The Guardianship Court removed the children from the Kutzners' care on the basis that the girls' development was so delayed that foster care was the only solution, drawing on the report of an expert witness. Mr. and Mrs. Kutzner appealed and had, in the meantime, obtained a letter from their doctor stating that the girls should be returned and the evidence of an expert in psychology who agreed. Mrs. Kutzner also gained a certificate in child-minding. As part of the appeal, the Regional Court appointed a second expert witness who gave evidence that the applicants were incapable of meeting more than the girls' basic needs and that knowledge and skills developed at school were likely to be stifled by the girls' home life. Accordingly, the Regional Court, and subsequently the Court of Appeal and *Bundesverfassungsgericht* dismissed the Kutzners' appeals. A subsequent expert report by a professor of educational science stated that the children would not be in danger if they lived with their parents and that Mr. and Mrs. Kutzner were emotionally and intellectually fit to raise their children. Educational support would largely compensate for any deficiencies.

The Kutzners brought proceedings before the ECtHR for violation of Article 8 ECHR. Since the mutual enjoyment by parent and child of each other's company constituted a 'fundamental element of family life', an interference with Article 8 was quickly established[20] under the

[19] *Kutzner v Germany,* App.No:46544/99
[20] Paras.58-59

interference/justification framework. However, the ECtHR then acknowledged the need to strike 'a fair balance' between the competing interests of the individual and the community as a whole.[21] It accepted that the measures of the German authorities were intended to protect the 'rights and freedoms' of the children.[22] It noted that views on the appropriateness of public authority intervention in childcare varied from state to state, depending on, *inter alia*, state traditions on the role of the family and budgetary concerns. The ECtHR also acknowledged that national authorities have a better knowledge of all the persons concerned. Consequently, it was not the role of the Strasbourg Court to substitute itself for domestic authorities exercising responsibility over the care of children, but rather to review whether they were acting within their margin of appreciation. The breadth of that margin varied according to *both* the seriousness of the risk to child welfare and the objective of family reunification. Particularly strict scrutiny was required where the interference with family life is so severe as to limit even contact between parent and child. As part of its mutual assessment of necessity, the ECtHR stated that the fact that an environment more beneficial to a child's upbringing existed was not enough to warrant the withdrawal of parental responsibility. However, it also did not consider the availability of measures less restrictive of family life to mean that removal of parental responsibility was unnecessary. Instead, it conducted an impact assessment of the potential impact on the children of family reunification, noting that the children had benefited from an early age from educational support and that the opinions of expert witness had conflicted. There had been no evidence of neglect or ill-treatment.[23]

The ECtHR then proceeded to assess the impact of the removal on the Kutzners' family life. It emphasised that measures less restrictive of their family life had not been sufficiently considered. It nevertheless reiterated the need for *balance* between serious, long-term interference with family life and the best interests of the child. The ECtHR noted that, in the present case, even visitation rights had been restricted and that this would likely have negative effects on the children. Having conducted this weighing of the relative impact of the protection of the right to family life and securing the rights of the child, the Strasbourg Court concluded that Germany had violated the Kutzners' right to family life and that the actions of that State were not justified.[24]

[21] Para.62
[22] Para.64
[23] Para.69-74
[24] Paras.75-82

By conducting a mutual impact assessment of the fundamental rights on *each other*, the ECtHR in *Kutzner* seeks to reconcile competing rights, as opposed to striving for a result that is the least restrictive of the right initially interfered with. As part of this assessment, the Strasbourg Court accepts that the international judge is not best-placed to make decisions of policy, that are derived from social and cultural traditions of family life and from the pragmatics of designing systems of social protection, nor to make decisions of fact when domestic authorities have a superior knowledge of the circumstances surrounding removal. In requiring the Contracting Party to act, nevertheless, within its margin of appreciation, the ECtHR lays down guidelines on how this is defined. It emphasises that the more serious the interference with the right to family life, for instance through the withdrawal even of visitation rights, the narrower the Contracting Party's margin of appreciation, while still mindful of the need to consider the seriousness of risk to the child.

It is submitted that the complexity of contemporary interactions between free movement and fundamental rights, the primary law status of both free movement and fundamental rights, the lack of uniformity in the Union's competence to achieve its goals, and the CJEU's role as a constitutional court, rather than one of fact, demands a similar approach from the Luxembourg Court for its adjudication of clashes between free movement and fundamental rights. Crucially, the ECtHR's balancing model is able to accommodate the variety of (often opposing) rights issues and policy considerations in a way that, as our discussion of the 'impact trio' in chapter two demonstrated, the CJEU's current one-sided approach to proportionality cannot. These arguments and the practicalities of implementing such an approach are discussed further in section three.

2.2. 'Striking a fair balance': the adjudication of rights clashes in the context of secondary legislation

The coming into force of the Lisbon Treaty has seen a genuine engagement, on the part of the CJEU, with the rights contained in the Charter, in its review of secondary Union legislation. Specifically, for our purposes, where secondary legislation, pursuing a particular purpose linked to fundamental rights, has been challenged as invalid due to its undermining of another fundamental right, the Court has acknowledged the equal worth of these competing norms, regardless of the aims of the secondary legislation itself. In order to determine which should

prevail, the Luxembourg Court has sought to find a fair balance between them, conducting an analysis of their respective impacts on each other.

For instance, in *Deutsches Weintor*,[25] Deutsches Weintor sought a declaration that it was permitted to use the phrase 'easily digestible' on the labels of one of its wines, despite the objections of the German authorities that this was a prohibited 'health claim', pursuant to Article 4(3) Regulation 1924/2006,[26] which precluded such statements on the labelling of alcoholic beverages. The German Federal Administrative Court made a reference to the CJEU concerning, *inter alia*, the compatibility of the prohibition on health claims in respect of wine with the fundamental rights to choose an occupation and to conduct a business, protected by the Charter. This was because producers were prevented from stating that their wine was 'easily digestible' even when, due to low acidity, this claim was correct.

Acknowledging the primary status of the Charter, the CJEU accepted that Article 15 CFR protected the freedom to choose an occupation, while Article 16 CFR guaranteed the freedom to conduct a business.[27] However, it noted too, that under Article 35 CFR, the Union was also obliged to ensure a high level of human health protection in its policies. Accordingly, it was necessary to assess Article 4(3) of the Regulation in relation to *both* Articles 15 and 16 CFR on the one hand, and Article 35 CFR on the other. The Court stated that it must conduct its assessment 'in accordance with the need to *reconcile* the requirements of the protection of those various fundamental rights protected by the Union legal order, and *strike a fair balance between them* [emphasis added]'.[28] Thus, the Court conducted, first, an assessment of the impact of allowing the contested phrase on wine bottles. It noted that there were risks of addiction, abuse, and serious disease connected to the consumption of alcohol, warranting its strict regulation and that public health concerns arising from alcoholic abuse had led to justifiable restrictions on the free movement of goods. Consumers had to be able to regulate their consumption and protect their health effectively by being in the position to consider the inherent dangers of alcohol consumption. Although substantively correct, the claim that Deutsches Weintor's wine was 'easily digestible' was silent as to the fact that, regardless of sound digestion, the inherent dangers connected to alcohol consumption had not been

[25] Case C-544/10 *Deutsches Weintor* [2010] EU:C:2012:526
[26] Regulation 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2007 L12/3)
[27] Paras.43-44
[28] Para.47

removed or even limited in that particular wine. By highlighting its 'easy digestibility', the label might encourage immoderate consumption, increasing the risk to health. Consequently, the total prohibition, without exception, of 'health claims' regarding alcoholic beverages could be viewed as necessary.[29]

However, crucially, this was insufficient to conclude that the measure was justified. It was also necessary to consider the impact of the prohibition on Articles 15 and 16 CFR. The Court noted that, although those rights were not absolute, restrictions upon them must correspond to objectives of general interest pursued by the Union, and not constitute, in any case, a disproportionate and intolerable interference impairing the very substance of those rights.[30] For the Court the restriction placed on the right to choose an occupation and the freedom to conduct a business was justified, in principle, by the objective of protecting health, recognised by Article 35 CFR. Moreover, the essential aspects of Articles 15 and 16 had been respected. Far from prohibiting the production and marketing of alcohol, the Regulation merely controlled, in a very clearly defined area, the labelling and advertising of such products. The substance of the rights contained in Articles 15 and 16 was unaffected. Consequently, the prohibition was justified in practice and the Regulation valid.[31] Thus, in *Deutsches Weintor*, the Court conducted a reciprocal proportionality test, assessing the mutual impact of fundamental rights on each other. The aim of the secondary legislation, which was to protect human health, was irrelevant.[32] By contrast, as the previous chapters have demonstrated, once a breach of primary free movement law is established, it is exclusively the fundamental right that must demonstrate its proportionality, in view of its impact on free movement. There is limited procedural space for the consideration of the fundamental rights consequences of the pursuit of free movement.

Similarly, in *Sky Österreich*,[33] Sky contested the requirement in Article 15 of the Audio-visual Directive[34] that it allow other broadcasters to choose short excerpts of broadcasts, for which Sky had exclusive broadcasting rights, for the purposes of short news programmes. Thus, the

[29] Paras.48-53
[30] Para.54
[31] Paras.55-60
[32] See also Case C-70/10 *Scarlett v SABAM* [2011] EU:C:2011:771; Case C-12/11 *McDonagh v Ryan Air* [2013] EU:C:2013:43
[33] Case C-283/11 *Sky Österreich* [2013] EU:C:2013:28
[34] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 Audiovisual Media Services Directive (OJ 2010 L95/1)

Court was tasked with reconciling a clash between Article 16 CFR (the right to conduct a business) on the one hand, and the right to receive information and promote the pluralism of the media, protected by Article 11(1) and 11(2) CFR, on the other. Again, the Court conducted a reciprocal proportionality test, assessing the impact of Article 15 on Sky's freedom to conduct a business, but also the effects of Sky's pursuit of this freedom on the plurality of the media and the rights of others to receive information. It noted that the core of Article 16 CFR remained because the Directive did not prevent business activity 'as such'. It also did not prevent the holder of exclusive broadcasting rights from using them to broadcast events for consideration or from granting new rights to others for consideration.[35] Further, the marketing on an exclusive basis, of events of high public interest was increasing and liable to restrict considerably the access of the general public to information regarding them.

The Court, nevertheless, exposed Article 15 of the Directive to questions of appropriateness and necessity. Since the provision put any broadcaster, irrespective of commercial and financial capacity, in a position to broadcast short news reports on matters of high public interest, it was found to be appropriate to the aim pursued. Crucially, on the question of necessity, while the Court accepted that there were less restrictive measures available, such as allowing holders of exclusive broadcasters access to compensation relating to the cost of securing exclusive broadcasting rights in the first place, it noted that this would not achieve the objective of freedom of information *as effectively* as Article 15. The proposed alternative could deter or prevent certain broadcasters, due to their limited financial capacity, from requesting access to broadcasts of high public interest and thus considerably restrict the freedom of information. Article 15 was therefore viewed as necessary for meeting the goal pursued.[36] These considerations of the *effectiveness* of fundamental rights protection are in stark contrast to the necessity test operating in relation to clashes between free movement and fundamental rights, which, as will be recalled from all previous chapters, generally focuses on finding restrictions less restrictive of free movement, which can reduce the legal space for considering the issue of effectiveness.[37]

In relation to residual proportionality, the CJEU held that it was 'necessary *to strike a balance* between the freedom to conduct a business, on the one hand, and the fundamental freedom of

[35] Paras.45-49
[36] Paras.54-56
[37] E.g. Case C-470/93 *Mars* [1995] EU:C:1995:224 (consumer protection); Case C-372/04 *Watts* [2006] EU:C:2006:325 (right to health). Both discussed in ch.2, s.3.3.

citizens…to receive information, and the freedom and pluralism of the media on the other'. Where two Charter rights clash, there is a need to seek *reconciliation* and a *fair balance* between them.[38] To determine whether a fair balance had been struck, the Court conducted a mutual impact assessment of the effects of the fundamental rights on *each other*. It noted, first, that interference with Article 16 CFR, by the need to protect the freedom of information, had been 'confined within precise limits'. By contrast, the increasing use of exclusive broadcasting contracts, for events of high public interest, was likely to 'significantly restrict' access to information about them by the general public. Consequently, the Union legislature had been entitled to prioritise the freedom of information in its Audio-visual Directive.[39] In other words, since the impact on freedom of information was significant, and the effect on the freedom to conduct a business minimal, the former should prevail.

The above case-law suggests that the primary status of the Charter has had an appreciable effect on the Court's cognisance of the need to 'strike a balance' between competing, but normatively equal, Union goals. The CJEU's adjudicative approach consists of a genuine attempt to reconcile conflicting fundamental rights through mutual impact assessments, which seek to find an outcome that protects the essence of both fundamental rights. However, the value of these cases could be questioned since the outcomes of both favour those fundamental rights corresponding to the aims of Union legislation. Particularly following the *Tobacco Advertising II* judgment,[40] the Court could be accused of being more lenient in its judicial review of the actions of the Union legislature compared with its approach to reviewing national legislation. However, there is evidence in the case-law that the Court *is* able to take fundamental rights seriously, even where their protection restricts the achievement of the core aims of EU secondary legislation.

For instance, the preamble to Directive 98/44/EC makes clear that its central purpose is to acknowledge the high-risk investment involved in genetic research and the consequent need for legal protection.[41] Noting, the significant progress in the treatment of disease by medical products derived from elements isolated from the human body, the preamble emphasises that technical processes in relation to these developments could not be excluded from

[38] Paras.59-60
[39] Paras.61-66
[40] Case C-380/03 *Germany v Parliament and Council* [2006] EU:C:2006:772
[41] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (OJ 1998 L213/13), recital 2

patentability.[42] Nevertheless, pursuant to Article 6(2)(c) Directive 98/44/EC, the use of human embryos for industrial and commercial purposes was unpatentable. In *Brüstle*,[43] a patent, held by Mr. Brüstle, had been found to be invalid since it covered human embryonic stem cells and the processes for their production. In short, although the patent involved a 'technical process', this required the prior destruction of human embryos. While the Directive allowed for the patenting of technical processes derived from elements of the human body, Article 6(2)(c) clearly stated that it was not possible to patent the use of human embryos for commercial and industrial purposes. A reference was made to the CJEU, asking, *inter alia*, for clarification of the term 'human embryo' and whether a technical process, which did not, itself, involve embryo destruction, but required this as a precondition for its operation, could be patented.

The CJEU considered that, although the Directive aimed to promote investment in biotechnology, it was also clear from its preamble that the use of biotechnological material from humans must be consistent with fundamental rights, in particular, human dignity. Consequently, the term 'human embryo' had to be interpreted widely. The Court held that the legislature clearly intended to exclude from patentability anything that could affect human dignity. Thus, an invention had to be regarded as unpatentable where it required the destruction of human embryos for its implementation.[44] In other words, the central aim of the Directive, the promotion of investment in biotechnology, had to be reconciled with competing objectives, such as respect for fundamental rights, even where this restricted biotechnological investment. This contrasts sharply with the CJEU's approach in *Laval*,[45] in which the statement within the recital to the Posted Workers' Directive, that it is without prejudice to the law of the Member States concerning collective action,[46] was largely neglected. Decided prior to Lisbon, and in the context of a clash at the level of EU primary law, the fundamental right to collective action was interpreted exclusively by reference to the primary objective of the PWD, namely the free provision of services, and what would be least restrictive of that freedom.

[42] Recitals 17, 20 and 21
[43] Case C-34/10 *Brüstle* [2011] EU:C:2011:669
[44] Paras.32-35, and 48,49 and 42.
[45] Case C-341/05 *Laval*, n.9
[46] Directive 96/71/EC concerning the posting of workers (OJ 1997 L18/1), Recital 22

Accordingly, in cases like *Brüstle*,[47] the CJEU has shown a clear ability to recognise that the maximum pursuit of the objectives of secondary legislation is not always possible in light of the need to respect fundamental rights. Indeed, where Union legislation represents a 'mere' public interest, the Court operates a fundamental rights bias whereby the Union instrument has to justify itself against an established interference with a Charter right.[48] Thus, it appears that it is the Court's adjudicative approach to clashes between primary free movement law and fundamental rights, which channels the dispute towards considerations of what is least restrictive of free movement, that is the core contributor to the potential undermining of fundamental rights by the CJEU.

Consequently, it would seem desirable to transfer the mutual impact assessment, used by the CJEU in the context of secondary legislation, into its adjudication of clashes between free movement and fundamental rights. Such an approach would be conducive to the Union's need to reconcile, as best it can, its often competing commitments to the internal market and to protecting fundamental rights. The next section will consider how the use of balancing, through mutual impact assessment, would operate in the context of primary free movement law.

3. Introducing balancing to EU primary law: overcoming practical concerns

Certain practical questions arise in relation to the adoption of a balancing model for addressing tensions between primary free movement law and fundamental rights. These primarily concern whether balancing can actually offer concrete outcomes rather than just an inherent normative statement that fundamental rights should be treated as equal to, rather than hierarchically lower than, free movement. In other words, what tools does balancing actually equip the Court with to resolve conflict between free movement and fundamental rights in practice? The second half of this section argues that through the process of reciprocal proportionality assessments, focused on mutual *impact*, balancing does offer a workable methodology for these conflicts. First, the section will re-emphasise the key arguments that

[47] See also Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] EU:C:2014:238

[48] Ibid. In this regard, it is worth comparing and contrasting the decision of the CJEU and the Opinion of the Advocate General in Case C-131/12 *Google Spain* [2014] EU:C:2014:317 (judgment)/EU:C:2013:424 (Opinion). The recognition, by the Advocate General, that the case concerned a clash between the right to privacy and the right to receive information led to a mutual impact assessment not conducted by the Court, which perceived the case as one of conflict between a fundamental right and a public interest.

support the transfer of a balancing model into clashes between fundamental rights and the primary free movement provisions.

3.1. Balancing as a better 'fit' for the Union's contemporary constitutional framework

It is argued here that the use of a balancing model, for clashes between free movement and fundamental rights, would seem a better 'fit' for the Union's contemporary constitutional framework. By allowing room for the examination of the effects of fundamental rights on free movement and the reciprocal consideration of the impact of free movement on fundamental rights, it leaves sufficient space for the recognition of competing Union aims. By not seeking an outcome that simply has the least restrictive effects on free movement, there is adequate scope for the Court to consider the *actual* effectiveness of alternative means of fundamental rights protection. Specifically, it can consider the idiosyncratic fundamental rights needs of the Member States, the peculiarities of certain fundamental rights, and the practicalities of designing programmes of fundamental social rights protection, given, not only the budgetary and administrative constraints facing Member States, but also the division of labour between the Union and the Member States in fields such as social policy.

In fact, the Court has, itself, made reference to the need to 'strike a balance' between competing Union objectives. In *Schmidberger*, the Court, having recognised the existence of a clash between free movement and fundamental rights, explicitly emphasised that 'the interests involved must be weighed having regard to all of the circumstances of the case in order to determine whether a fair balance has been struck between those interests'.[49] Even in the *Viking* and *Laval* cases, the Court stated that the fundamental freedoms 'must be balanced against the objectives pursued by social policy'.[50] However, by retaining the breach/justification approach, and imposing the standard proportionality questions on the protection of fundamental rights at the justification stage, a *genuine* balancing was not effected. Rather, fundamental rights remained procedurally disadvantaged.

[49] Case C-112/00 *Schmidberger* [2003] EU:C:2003:333, para.81
[50] Case C-438/05 *Viking*, n.7, para.79; Case C-341/05 *Laval*, n.9 para.105

However, post-Lisbon, there has been an emerging acceptance of the need to alter the adjudicative framework in recognition of new constitutional dynamics. In *Santos Palhota*,[51] which also concerned the posting of workers, Advocate General Cruz Villalón argued that the changes brought about by the Lisbon Treaty, specifically Article 9 TEU, Article 3(3) TEU and the primary status of the Charter, required a different approach to restrictions placed on free movement as a result of social policy. Since worker protection is warranted under the Treaty itself, it could no longer be viewed as a 'simple derogation from a freedom, still less an unwritten exception inferred from case-law'.[52] Insofar as the Treaty provides for a *high* level of social protection, it 'authorises the Member States', for the purpose of safeguarding social protection, to restrict fundamental freedoms and to do so *without* Union law regarding this as something 'exceptional', requiring 'strict' interpretation.[53] The Advocate General's subsequent exposure to the proportionality test of only the *social* endeavours involved in the case somewhat undermines this important recognition of the Union's constitutional evolution. However, significantly, the Advocate General emphasised that the proportionality test must be conducted in an *individualised* manner, which, in accordance with the Treaty had to be particularly sensitive to the social protection of workers.[54] This meant that when the Advocate General came to review the necessity of the relevant Member State measures, he was able to consider whether measures less restrictive of free movement would also be as *effective* in achieving the goal of social protection, concluding in that case that they would be.[55]

A sharper focus on *balancing* was, however, apparent in the Opinion of Advocate General Trstenjak in *Commission v Germany*.[56] Local authorities in Germany had awarded service contracts, in respect of salary conversion schemes for old-age pensions, to service providers referred to in a collective agreement, without first making a call for tenders. Consequently, the Commission brought an action, arguing that Germany had not met its obligations under the Public Procurement Directives.[57] Since these instruments were concerned with the implementation of the freedoms of establishment and services, the Advocate General elevated

[51] Case C-515/08 *Santos Palhota* [2010] EU:C:2010:245
[52] Para.53
[53] Ibid
[54] Para.55
[55] Paras.71-76
[56] Case C-271/08 *Commission v Germany* [2010] EU:C:2010:183
[57] Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the awards of public service contracts (OJ 1992 L209/1) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public contracts , public supply contracts, and public service contracts (OJ 2004 L134/114)

the conflict to the level of primary law.[58] Accordingly, the case involved a clash between free movement and the right to bargain collectively, contained in Article 28 CFR. In addressing the conflict, Advocate General Trstenjak conducted a review of the recent case law, specifically *Viking* and *Laval*. She noted that, despite acknowledging the Union's social objectives, the Court had subsumed fundamental social rights within the existing scheme of analysis relating to 'overriding reasons of the public interest', making them answerable to the standard justificatory hurdles of legitimacy of aim, appropriateness, and necessity.[59] The Advocate General argued that this approach sat 'uncomfortably alongside the principle of equal ranking for fundamental rights and fundamental freedoms [and]…suggests the existence of a hierarchical relationship between fundamental freedoms and fundamental rights in which fundamental rights are subordinated to fundamental freedoms…'[60] For her, 'no such hierarchical relationship' exists.[61]

As a result, Advocate General Trstenjak emphasised the need for 'a fair balance' between free movement and fundamental rights in instances of conflict. This would only be ensured when:

> '…the restriction by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, however, nor may the restriction on a fundamental right by a fundamental freedom go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom…this analysis based on the principle of proportionality is capable of producing an outcome which ensures the optimum effectiveness of fundamental rights and fundamental freedoms'[62]

Thus, it is necessary to consider the impacts of free movement and fundamental rights on *each other* and seek an outcome that is least restrictive of *both* norms. While it might be possible to protect a fundamental right in a way less restrictive of free movement, this alternative has, itself, to be tested against the obligation that free movement imposes as few restrictions as possible on fundamental rights. This might mean that higher limitations can legitimately be placed on free movement than would be the case under the one-sided proportionality assessment that the Court currently operates. Accordingly, the Opinion of Advocate General Trstenjak signifies the emergence of a balancing model in the context of

[58] Para.177
[59] Paras.179-182
[60] Para.183-184
[61] Para.186
[62] Para.190-191

conflict between free movement and fundamental rights and is important in proposing a 'more symmetrical approach which acknowledges the economic freedoms must sometimes give way to fundamental rights'.[63]

However, this development is partially limited by the Advocate General's reliance on the *Schmidberger* case to support her argument, and her concrete application of balancing.[64] Specifically, having noted that evidence provided by the German government concentrated on whether its protection of fundamental rights was appropriate and necessary, Advocate General Trstenjak's implementation of proportionality still focused on these questions, imposing a heavier evidential burden upon fundamental rights than on free movement and remaining structurally one-sided.[65] The Advocate General still emphasised that a measure is 'necessary' if it is the 'least onerous' way of pursuing the right at issue.[66] Nevertheless, her earlier discussion of the need for 'fair balance' does encourage a stronger consideration of the *effectiveness* of alternatives. In other words, whether alternatives less onerous to the pursuit of free movement would impose too great a restriction, in turn, on collective bargaining:

> …[o]nly if the social partners could have achieved an alternative consensus, conforming more closely to Community law, could the preliminary selection at issue in favour of certain pension scheme providers be rejected as unnecessary.
>
> In answering [that] question…the Court must proceed with caution [and] respect as far as possible the social partners' scope for assessment and action.[67]

Thus, the concept of balancing has already created more legal space for the appreciation of the division of labour – in terms of policy-formation – within the Union. Nonetheless, the Advocate General concluded that it was possible to envisage the creation of a conversion of

[63] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', (2011) 11(4) HRLR 645, 677; see also C. Barnard, S. Deakin, 'European Labour Law after *Laval*' in M. Moreau (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011), ch.16; V. Trstenjak, E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU', (2013) 38(3) ELRev 293, 313-314

[64] See also, Douglas-Scott, ibid

[65] Nevertheless, there is evidence in Case C-112/00 *Schmidberger*, n.49, paras.89-91 of the Court attempting to draw comparisons between the impact of the freedom of expression on freedom of movement and, as a mirror image, the effect of free movement on freedom of expression. The Court notes that while the Austrian State had done everything it could to keep restrictions on free movement to a minimum, any further limitations on freedom of expression would have constituted an 'unacceptable interference' with the fundamental rights of demonstrators. However, the Court still referred to restriction on free movement being 'tolerated' because of the need to protect fundamental rights, which maintains connotations of wrongfulness in relation to fundamental rights.

[66] Para.209

[67] Para.210-211

earnings scheme, as required by the collective agreement, but implemented by means of a call for tenders, as necessitated by the public procurement directives. In sum, the Advocate General considered the impact on free movement to be greater than that on fundamental rights:

'The requirements [regarding the list of approved service providers] must be regarded as technical implementation provisions *hardly touching* on terms and conditions of employment whilst at the same time their effect is to exclude *in their entirety* the requirements arising from the principles of freedom of establishment and freedom to provide services [emphasis added]'.[68]

Thus, by comparing the relative impact of free movement and fundamental rights *on each other*, Advocate General Trstenjak in *Commission v Germany* sought an outcome that reconciled the competing needs of free movement and fundamental rights, rather than simply asking what would be least restrictive of free movement.

Although the Court, in this case, was not as explicit as its Advocate General, there is evidence of the CJEU's cognisance of the need to take a more holistic approach to the Treaty.[69] Crucially, the Court did not conduct a two-stage breach/justification analysis. Indeed, as Barnard and Deakin remark, rather than attempting to establish a breach of free movement, via its usual *Säger* market access approach, the Court instead cites *Schmidberger* as authority for the need to *reconcile* competing interests.[70] Instead of exposing the protection of fundamental rights to the question of whether it is pursued in a way that is least restrictive of free movement, the issue was whether, 'a fair balance was struck in the account taken of the respective interests involved'.[71] It concluded that it was not as the effect of the collective agreement was 'to disapply the public procurement rules completely'.[72] By contrast, compliance with public procurement rules could still respect the right to collective bargaining because their application did not 'preclude the call for tenders imposing on interested tenderers conditions reflecting the interests of the workers concerned'.[73] Thus, the Court tested the necessity of the collective agreement in relation to restrictions it placed on free

[68] Paras.212-231
[69] Case C-271/08 *Commission v Germany* [2012] EU:C:2010:426
[70] Barnard, Deakin, n.63, 265-267
[71] Para.52
[72] Para.53
[73] Para.56

movement, but also the impact that protecting collective agreements in a way less restrictive of free movement would have on the *effectiveness* of those agreements.

Accordingly, a balancing model, through mutual impact assessments, leaves greater legal space for the complexity of defining fundamental rights. Recalling the 'impact trio' triggered by the breach/justification framework, under a balancing approach, the necessity of a fundamental rights standard, in relation to consumer protection,[74] might be determined by reference to whether measures less restrictive of free movement would be as effective in light of the language spoken in a Member State.[75] Similarly, balancing has the capacity to appreciate that the fundamental right to access to housing or healthcare[76] forms part of a larger budgetary plan, which limits public authorities' abilities always to choose the option least restrictive of free movement. We have already seen, throughout this thesis, that the two-stage model limits the appreciation of these factors.[77] Thus, the case suggests an emerging doctrinal adjustment regarding the interaction between free movement and fundamental rights in the post-Lisbon era.

Nonetheless, it remains necessary to consider what a clearer commitment to balancing would look like. Crucially, a firmer departure from the breach/justification model is needed to ensure a fully *reciprocal* assessment of impact.

3.2. Operating a balancing model in the context of primary free movement law

It will be recalled from chapter one that the Treaty does not inherently *require* the treatment of fundamental rights as a derogation from free movement.[78] As the rest of the thesis has demonstrated, the structural position of fundamental rights has rather evolved organically out of the Union's historically economic focus and key constitutional developments. For instance, the statement in Article 36 TFEU that 'Articles 34 and 35 TFEU *shall not preclude* measures justified by' the reasons contained therein arguably suggests that competing norms should be considered *alongside* each other as part of an overall assessment. Moreover, since

[74] Art.38 CFR
[75] In contrast to e.g. Case C-315/92 *Clinique* [1994] EU:C:1994:34
[76] Arts.34 and 35 CFR
[77] Joined Cases C-197/11 and C-203/11 *Libert* [2013] EU:C:2013:288; Case C-372/04 *Watts*, n.37
[78] Ch.1, s.4.3.1.

fundamental rights do not feature in the Treaty's derogating provisions, a clash between, say, the free movement of goods and fundamental rights can be formulated as a conflict between Article 34 TFEU and Article 6 TEU. Accordingly, the balancing of these competing values would be more constitutionally appropriate than the establishment of a *prima facie* breach, followed by a one-sided justification assessment.

Nevertheless, any balancing model introduced into EU primary law will have to retain the formal shape of a two-stage process in light of the fact that, pursuant to the principle of conferral,[79] the Court requires a hook to EU law in order to have jurisdiction over fundamental rights concerns.[80] Indeed, the principle of conferral might be viewed as an additional cause of adjudicative imbalance, beyond the constitutional trinity discussed in chapters two, three and four since, as Weiler and Lockhart remark:

> Formalistically, the Court has no option but to decide first whether the national measure…constitutes a *prima facie* prohibited restriction and only in the second place whether it can be justified… Only if the first question is answered in the affirmative…could the human rights dilemma become an issue.[81]

However, although the principle of conferral might have been a key player in provoking a two-stage structure, it has not led to an increase in the volume of interactions between free movement and fundamental rights. Nor does it require or extend the evidentiary gap between establishing a breach of free movement and proving a justification. Indeed, conferral can be satisfied without recourse to a proportionality test that reviews Member State rules exclusively from the perspective of what is least restrictive of free movement. Crucially, then, a two-stage *balancing* approach, similar to the adjudicative methodology employed by the ECtHR, will respect the principle of conferral. It will be recalled, from section two, that the Strasbourg Court first establishes that there has been an *interference* with the Convention right, which the applicant argues has been violated. However, this does not establish a *prima facie violation* of that right. Instead, the presence of a second *competing* fundamental right triggers a different *reciprocal* proportionality assessment. A violation is not established until this balancing is complete. This approach neutralises the manifest wrongfulness that might

[79] Art.5(2) TEU
[80] Case 12/86 *Demirel* [1987] EU:C:1987:400, para.28; Case C-299/95 *Kremzow* [1997] EU:C:1997:254.
[81] J. Weiler, N. Lockhart, ''Taking Rights Seriously' Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part II' (1995) 32(2) CMLRev 579, 600

otherwise accompany an initial finding of breach. In *Deutsches Weintor*, the CJEU adopted a similar system with regard to secondary legislation.[82]

Similarly, the Luxembourg Court could employ an approach whereby it seeks first to establish an initial *obstacle* to free movement but the use of a fundamental right to explain it would automatically trigger the use of a new proportionality assessment. 'Obstacle' would no longer be synonymous with *prima facie* breach as is currently the case. Critically, rather than being viewed as a *justification* for a *breach* of free movement, requiring a proportionality test that seeks to find an outcome least restrictive of free movement, fundamental rights would be presented as an *explanation* for initial *obstacles* to free movement. This would trigger a *mutual* proportionality assessment that seeks compromise between these competing objectives, counteracting the imbalance of a two-stage approach. Initial steps towards such an approach are visible in the reasoning of the Advocate General in *Santos Palhota*.[83] As Nic Shuibhne notes:

> The Advocate General's interpretation of the impact of the Lisbon Treaty retains the *formal* shape of the Court's [two-stage] method in free movement case law; but it changes profoundly the *emphasis* that should be attached to public interest arguments in the second…stage when the relevant objectives are themselves recognised by the Treaties.[84]

Thus, while, for instance, Article 34 TFEU might remain the initial 'hook' to EU law, the existence of Articles 2, 3, 4, and 6 TEU, as well as the Charter, would channel a free movement/fundamental rights conflict away from the standard adjudicative model, which structurally favours free movement, towards a balancing framework. In this way, the need for the scope of EU law to be triggered would not be problematic but free movement would also no longer be treated as 'too' fundamental.

A further question that arises from the proposal of a balancing model is the relative weight to be afforded to the competing values of the Union. Nic Shuibhne argues that the objectives shaping the EU internal market are 'profoundly imprecise'[85] and that '…different parts of the Treaty do not include appropriate guidance about [their] relative internal or systemic

[82] Case C-544/10 *Deutsches Weintor*, n.25
[83] Case C-515/08 *Santos Palhota*, n.51
[84] N. Nic Shuibhne, *The Coherence of EU Free Movement Law: Constitutional Responsibility and the Case Law of the Court of Justice*, (OUP, 2013), 49
[85] Nic Shuibhne, ibid, 46

weight.'[86] Acknowledging the ongoing prioritisation of free movement at the justification phase of the two-stage approach, Nic Shuibhne recognises that 'a more nuanced approach would posit the different values and objectives expressed in Article 3(3) [TEU] as at least equal to free movement rights',[87] especially where the conflicting value concerns a fundamental right. But, she argues, ''equal' legal status does not signal an obvious way forward when values collide'.[88]

This does not mean that the relative weight of free movement can continue to be determined according to an outdated economic framework devised when many of the aims contained in the contemporary Treaty were not a Union (or rather an EEC) concern. As Mason recognises, 'the compromise sought at the Treaty of Rome, whereby greater economic integration and wealth was promised in exchange for a separate *Ordungpolitik* outside of the Member States' competence, while Member States remained in charge of 'social' policy broke down several decades ago'.[89] Any adjudicative model should, at the very least, *consider* the impact of free movement on new aims. The capacity for the Court to do this, under an imbalanced adjudicative structure that channels proportionality assessments towards the question of what is least restrictive of free movement, is low. Thus, until the Treaty provides further guidance, the Court must exercise its 'immense institutional power'[90] responsibly to develop an adjudicative model more suited to the Union's contemporary constitution.

It is submitted that a model that starts by treating free movement and fundamental rights as equal, and then seeks to reconcile the two by striving for an outcome that is least restrictive of both norms is a workable approach. This can be compared to Alexy's definition of balancing as 'the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other'.[91] Alexy's theory does not focus on the intrinsic value of a norm; indeed he argues that this 'can never be determined independently or absolutely'.[92] Instead, the analysis centres on 'the extent to which one principle is infringed

[86] N.84, 203-204
[87] N.84, 46-47
[88] Ibid
[89] L. Mason, 'Labour Law, the industrial constitution and the EU's accession to the ECHR: the constitutional nature of the market and the limits of rights-based approaches to labour law', in K. Dzehtsiarou et al, *Human Rights Law in Europe: The Influence, Overlaps and Contradictions of the EU and ECHR*, (Routledge, 2014), ch.9, 149
[90] Nic Shuibhne, n.84, 246
[91] R. Alexy, *A Theory of Constitutional Rights*, (OUP, 2010) 102
[92] Ibid

for the benefit or satisfaction of another'.[93] In the Union context, values might also be grouped together when assessing impact. For instance, where the free provision of services clashes with the right to strike, the Court might consider, when examining the effects of free movement on collective action: the *primary* status of the Charter, which recognises the fundamental right to strike; the Union's commitment to proper social protection, taking into account diverse national practices;[94] its task of ensuring a highly competitive *social* market economy;[95] its recognition of the role of social partners;[96] and the Union's explicit lack of legislative competence in relation to the right to strike.[97]

Nevertheless, there remain further practical hurdles facing the operation of mutual impact assessments. The first relates to the Court's consistent assertion that no *de minimis* test operates in relation to free movement since a balancing model requires consideration of the concrete impact of competing fundamental rights on free movement.[98] Advocate General Jacob's famous call for a 'substantial impact on market access' test for establishing a breach of free movement, though welcomed by a sizeable section of the literature,[99] has never been explicitly approved by the Court.[100] However, for two reasons, it is time that the CJEU accepted some kind of *de minimis* assessment in this regard. First, the growing gap, outlined in chapter two, in the evidentiary burden placed on free movement, on the one hand, and fundamental rights, on the other, cannot be justified in a Union committed to respecting fundamental rights. Second, despite a generally consistent refusal to apply a *de minimis* threshold in the context of free movement, Nic Shuibhne has produced evidence of an 'obliquely operative' *de minimis* test in several free movement cases.[101] Consider, for instance, *Garcia Avello*, which required 'serious inconvenience' to the exercise of free movement;[102] or the total or near total prohibition on product use in *Mickelsson and Roos* and *Italian Trailers*.[103]

[93] S. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice', (2013) 9(1) ULRev 169, 170
[94] Art.151 TFEU
[95] Art.3(3) TEU
[96] Art.152 TFEU
[97] Art.153(5) TFEU
[98] Case 269/83 *Commission v France* [1985] EU:C:1985:115; Case 67/97 *Bluhme* [1998] EU:C:1998:584
[99] See e.g. S. Weatherill, 'After Keck: Some Thoughts on How To Clarify the Clarification', (1996) CMLRev 885
[100] Case C-412/93 *Leclerc-Siplec v TV1 and MG* [1995] EU:C:1994:393
[101] Nic Shuibhne, n.84, 163
[102] Case C-148/02 *Garcia Avello* [2003] EU:C:2003:539, para.36
[103] Case C-142/05 *Mickelsson v Roos* [2009] EU:C:2009:336; Case C-110/05 *Commission v Italy* [2009] EU:C:2009:66

One reason for rejecting a *de minimis* standard in the context of free movement has been its traditional association with *quantitative* assessments within competition law. Oliver has argued that introducing quantitative economic assessments into free movement would be a 'disaster' for legal certainty.[104] Davies has additionally stressed that free movement law differs from competition as it often involves smaller actors who are unable to provide complex economic assessments.[105] However, the *de minimis* test emerging in Nic Shuibhne's case-law analysis is *qualitative* in nature. She argues for the introduction of an 'appreciability' test that would require some sort of qualitative impact on free movement before a breach is established. She nevertheless accepts such a model would present some challenges.[106] How to define, for instance, a 'serious' or 'considerable' restriction on free movement? Nic Shuibhne acknowledges Weatherill's remarks that while these thresholds appear 'crucial' they are alarmingly elusive and seem inevitably to point to a messy case-by-case application.[107] Responding to these issues, she argues that qualitative methods are still a constituent of science and emphasises that it is the responsibility of the Court to define qualitative terms in a systematically coherent way.[108] Although Nic Shuibhne's discussion centred on the issue of breach, her arguments are equally relevant to a balancing model.

While concepts such as 'serious' are hard to define, mutual impact assessment would at least require the Court to articulate and then consider explicitly the level of interference imposed by free movement on fundamental rights and vice versa. In order to avoid the 'messy case-by-case analysis' that troubles Weatherill, the CJEU could lay down general guidelines relating to when restrictions on free movement are considered particularly serious. For instance, we might see a presumption of serious impact in cases of direct discrimination. Likewise, a high level of interference with fundamental rights might be presumed, where limitations are placed on political speech. Other restrictions on free movement might also be found to be 'high', on the facts, but without enjoying such presumptions. For example, in a case similar to *Italian Mopeds*, where there is no direct or indirect discrimination or DRB, applicants would have to demonstrate the impact of receiving State rules on, what Nic Shuibhne defines as, their

[104] P. Oliver, 'Some further reflections on the scope of Articles 28–30 (ex 30–36) EC', (1999) CMLRev 783, 806
[105] G. Davies, 'The Court's jurisprudence on free movement of goods: pragmatic presumptions, not philosophical principles' (2012) European Journal of Consumer Law 25, 31
[106] N.84, 254
[107] Ibid; S. Weatherill, 'Free movement of goods', (2012) 61(2) ICLQ 541, 542-543
[108] N.84, 225, and 183-184

'access to free movement rights'.[109] This might be demonstrated by the existence of a total ban on product use, but this would still have to be balanced against the (possibly) high level of interference with fundamental rights that might arise from product entry onto the market of the receiving States.

This approach would be in stark contrast to the outcome of cases such as *Gourmet* under the existing breach/justification model.[110] As chapter two explained, in that case, the ban on certain types of advertising of alcohol in Sweden was found to be a breach of the free movement of services due to the 'international nature of advertising'. There was no need to identify actual clients coming from other Member States who wished to use Swedish advertising space to sell alcoholic beverages. Nor was there any obligation on the Court to consider whether those wishing to sell advertising space were materially affected by the ban when they could sell advertising to other clients. As Spaventa has argued, *Gourmet* seemed to be about challenging the very existence of regulation, rather than about the limitation of free movement rights.[111] In such situations, the impact on access to free movement rights should be viewed as low. Crucially, as well as placing no real evidentiary burden at the breach stage, there was also no analysis of the impact of free movement on Swedish attempts to protect the right to health. Given the potentially low impact on access to free movement rights by the Swedish rules in *Gourmet*, it seems that a mutual impact assessment would have led to a different result.[112]

One of the dangers linked to defining a breach through an analysis of norms' relative impact on each other, as Nic Shuibhne has recognised, in a different context, is that, 'prejudging what may or may not have any real impact on the decision to go to another Member State is…dangerously subjective ground'.[113] As she accepts, this is inherent in qualitative appreciability thresholds. This criticism can be levelled at balancing itself, which incorporates considerable judicial discretion.[114] However, this discretion is no greater than that operating under the current two-stage approach. Moreover, as de Vries points out, it is 'often unavoidable in solving conflicts between fundamental rights', which are hardly ever absolute

[109] N.84, 256
[110] Case C-405/98 *Gourmet* [2001] EU:C:2001:135
[111] E. Spaventa, 'From *Gebhard* to *Carpenter*: Towards a (Non)-Economic European Constitution', (2004) 41 CMLRev 743, 754-755
[112] For instance, compare and contrast with Case C-544/10 *Deutsches Weintor*, n.25
[113] Nic Shuibhne, n.84, 177
[114] De Vries, n.93

in character.[115] Nevertheless, this problem can be mitigated, although not completely overcome, in two ways. First, indicators of impact on both free movement and fundamental rights can be presented to the CJEU as part of the national court's preliminary reference, and during written and oral submissions.[116] This can be seen as a reproduction, within the logistical confines of judicial proceedings, of the already accepted need, at Union legislative-level, to conduct fundamental rights impact assessments 'to provide the Commission, right from the start…with a complete picture of the various impacts…on individuals and groups whose rights may be involved, depending on the options envisaged'.[117] Pre-legislative impact assessments might also prove useful in the judicial balancing of free movement against fundamental rights where the matter involves secondary legislation implementing free movement and elevated to a primary law dispute.

Second, while the CJEU should act as a forum for the articulation of genuine supranational concerns, final decisions should be taken as closely as possible to the site of the dispute, namely at the level of the national courts. Thus, having considered the various submissions, the CJEU is well-placed to highlight to national courts the impact of domestic rules on EU objectives. It can remind the Member States of their commitment to the European project, and their Treaty obligations. It can highlight the legitimate need, in some cases, for Member States to alter their fundamental rights approaches, where equivalent fundamental rights standards can provide sufficient protection with fewer negative consequences for free movement. In short, it can require some give and take from the Member States. Thus, the Court's statement in *Beer Purity*, that consumers' conceptions vary from State to State but will also evolve over time as part of the establishment of the Common Market, and that '…the legislation of a Member State must not be allowed to crystallise given consumer habits so as to consolidate an advantage acquired by national industries' is a legitimate one.[118] The ability of the CJEU to act as a forum for comparing and contrasting different fundamental rights methodologies will be particularly important, in cases like *Omega* and *Grogan,*[119] where a free movement/fundamental rights dispute also represents conflict between two different Member

[115] N.93
[116] On the importance of the preliminary reference procedure to judicial dialogue and individual 'voice' in the definition of fundamental rights norms, see A. Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*, (OUP, 2009), 128-129
[117] Commission Communication on Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals COM(2005) 172, 3-4
[118] Case 178/84 *Commission v Germany* [1987] ECR 1227, para,32
[119] Case C-36/02 *Omega*, n.8; Case C-159/90 *Grogan* [1991] EU:C:1991:378

States' fundamental rights definitions. Here, fundamental rights conflict arises *because of* participation in the internal market. Accordingly, the CJEU is not only legitimately involved in fundamental rights issues but the only institution capable of airing competing claims.

On the other hand, mutual impact assessments will also require the Court to have genuine regard for our identified trio of impact, which free movement can impose upon fundamental rights. As outlined above, the Court should also be cognisant of the potential effects of the pursuit of free movement on other Treaty aims. In other words, an holistic approach to the Treaty is needed. When deciding whether Member State methods for pursuing certain legitimate aims impose too great a restriction on free movement, the Court should take particular care in considering what competence the Union has to meet these goals supranationally. The Court should always examine whether the Union is able to act in place of individual Member States and, if it cannot, whether the Court should leave more room to the Member States to perform this function. This is especially the case when domestic measures are only tangentially related to free movement or where the Treaty has explicit objectives in this field but largely leaves their implementation to the Member States. In such situations, as De Búrca points out, 'a thorough enquiry into what alternative means the state might have chosen to pursue its aims [would lead to the CJEU] effectively assuming…a legislative role [raising] concerns about legitimacy'.[120]

Nevertheless, where judicial action is necessary, questions of the impact of free movement on fundamental rights must be taken, as frequently as possible, by the national courts. Having both the guidance of the CJEU – on the supranational effects of the normative interaction – and the factual background to the case, the national courts 'enjoy the best knowledge of the facts, and can assess the impact of different interpretations to the case at hand'.[121] Torres Perez argues that interpretative decisions on fundamental rights are 'better taken at a level closer to the citizen',[122] while Nic Shuibhne highlights the national courts' ability to 'tighten the connection between the decision-maker and the policy-maker, as well as to the parties actually affected by the outcome'.[123]

[120] G. de Búrca, *Fundamental Rights and the Reach of EC Law*, (1993) OJLS 13(3) 283, 295
[121] Torres Perez, n.116, 120
[122] N.116, 170
[123] Nic Shuibhne, n.84, 250

Moreover, national courts can and should be trusted with this responsibility. First, they act as agents of both the European and national legal orders. Facing upwards, to the supranational level, Article 267 TFEU, as interpreted by the CJEU in *Opinion 1/09*,[124] involves domestic courts in the 'correct application and uniform interpretation of European Union law'. Indeed, although not consistently adhered to by the CJEU, 'under the proper division of functions between the Court of Justice and national courts, it is precisely the responsibility of the Court of Justice to provide and reinforce a coherent guiding structure for the application of proportionality in cases with an EU dimension, [while] the application of that structure to concrete fact-sets should be…the task of the referring court'.[125] The judicial diplomacy in the *Solange* line of case-law demonstrates awareness amongst national courts that the consistent rejection of CJEU rulings might 'undermine the efficacy of EU law and impair the integration project'.[126] Facing downwards, to the national level, domestic courts are also in a better position than the CJEU to understand legitimate idiosyncratic needs within the Member States and to have access to facts relevant to the practical decisions of policy-makers. It is this dual role, of EU and national court, that allows domestic courts to come closer to effecting genuine balance between conflicting interests. One potential issue is in cases such as *Omega*,[127] involving also a clash between two Member State definitions of a fundamental right. Leaving concrete application to the national court brings the final decision closer only to one of those Member States. Nevertheless, the preliminary reference procedure allows the CJEU to provide any necessary guidance in this regard and to highlight the supranational obligations of, for instance, the receiving State.[128]

This section has addressed the practical questions arising from the introduction of a balancing model into the adjudication of clashes between the primary free movement provisions and fundamental rights. Under a process of mutual impact assessment, when these conflicts occur they cannot be overcome simply by the existence of alternatives less restrictive of free movement, since these must also be *effective* means of securing fundamental rights. This creates greater legal space for analysis of the idiosyncratic fundamental rights needs of the Member States, the peculiarities of particular fundamental rights, such as the right to strike, or the pragmatic concerns attached to devising programmes for the protection of fundamental

[124] *Opinion 1/09* [2011] EU:C:2011:123, para.84
[125] Nic Shuibhne, n.84, 28
[126] Torres Perez, n.116, 124
[127] Case C-36/02 *Omega*, n.8
[128] See alternatively, Nic Shuibhne's argument in relation to 'moral spaces', in, 'Margins of Appreciation: national values, fundamental rights and EC free movement law', (2009) 34(2) ELRev 230

social rights. This framework of reciprocity requires the acceptance of a qualitative *de minimis* framework in relation to a breach of free movement. Since balancing involves relative assessments, for reasons of legal certainty, the Court should lay down general guidance in relation to what will constitute high impacts on free movement and fundamental rights. In all cases, any amount of interference would, nevertheless, have to be weighed against its relative impact on fundamental rights. The final analysis, in this regard, should be left to the domestic courts. Through access to the general guidance of the CJEU, they are suitably cognisant of Member States' supranational obligations. However, they are also aware of particular domestic constitutional needs and their proximity to the factual environment of the case mitigates against the subjectivity of qualitative assessment.

4. Does mutual impact assessment undermine the fundamentality of fundamental rights? Treating free movement as a fundamental right

It will be recalled from chapter one,[129] that fundamental rights are an 'essentially contested concept'.[130] Their existence, normative position, scope and content are the subject of such intense and rigorous debate that, in truth, the term 'human right' can be viewed as 'nearly criterionless'.[131] Accordingly, defining what is, and what is not, a fundamental right is not a question that is easily answered, while any efforts will always invite subsequent debate. In light of this, chapter one recognised that any real attempt to answer this question was beyond the scope of this work. Consequently, that chapter, instead, outlined the well-known claim that fundamental rights are universal, a-political, timeless and absolute norms. It then acknowledged and provided an overview of the vast literature that strongly contests those assertions, and which argues that fundamental rights are, in fact, shaped by politics, ideology, culture, and history. Chapter one, nevertheless, posited that, regardless of these criticisms, fundamental rights remained useful as social facts, as opposed to universal truths, which can shine a spotlight on the particular values of society.

Often recalling but also re-framing that discussion, this subsection will test the free movement provisions against the definition of fundamental rights as universal absolutes. It will accept

[129] Ch.1, s.4.2
[130] F. Hoffmann, 'Foundations beyond Law', in C. Gearty, C. Douzinas (eds), *The Cambridge Companion to Human Rights Law*, (CUP, 2012), ch.4, 83
[131] J. Griffin, *Griffin on Human Rights*, (OUP, 2008), 14

that this terminological framework presents some appreciable challenges to defining free movement as a fundamental right. However, since many largely accepted fundamental rights *also* fail to meet the conditions imposed by universalism, these hurdles arguably reflect a weakness within that definitional model, rather than a problem *per se* with free movement. In light of this, the subsection will favour an approach grounded in legal positivism. It will argue that the explicit constitutional significance of free movement within the EU's legal order renders it a fundamental right, as a social fact, within that framework. This is especially true following the introduction of Union citizenship and the primary status of the Charter.

Before embarking on this analysis, however, it is worth noting that an adjudicative model that treats free movement as *equal* to fundamental rights is automatically more respectful of the latter norms than the Court's current breach/justification methodology, since the latter framework treats free movement as *more* fundamental than fundamental rights. Thus, the presentation of free movement as (equal to) a fundamental right, unusually, reduces its normative force. Similarly, the proposed balancing model is likely to be more readily compliant with the EU's forthcoming obligations under the ECHR, reducing the potential for the systems collision detailed in chapter one.[132] Although an adjudicative structure that prioritises fundamental rights *over* free movement would reduce the risk of systems clash even further, a balancing model reflects the different goals of the Union whilst still leaving sufficient space for the EU's Convention obligations. Significantly, the Convention only provides a *floor* of protection. Consequently, the treatment of free movement as a fundamental right within the Union legal order will only be problematic where (other) fundamental rights are denied this minimum by the treatment of free movement as fundamental. However, these questions can be incorporated into the mutual impact assessment as part of a balancing model in order to prevent this eventuality. The Strasbourg Court is unlikely to be concerned with the adjudicative methodology of the Luxembourg Court if substantive outcomes meet Convention standards. Sabel and Gerstenberg argue that this can be understood in the Rawlsian sense of overlapping consensus. This states that 'there is agreement on fundamental commitments of principle – those essentials which each order requires the others to respect as the conditions of its own deference to their decisions[. I]t does

[132] Ch.1, s.4.3.2.2

not rest on mutual agreement on any single, comprehensive moral doctrine embracing ideas of human dignity, individuality or the like'.[133]

This is linked to the very different tasks of the ECtHR and the CJEU. As has been acknowledged, the Luxembourg Court frequently faces fundamental rights questions arising as a *direct* result of freedom of movement. This is reflected in *Omega* where a conflict between UK and German approaches to human dignity was triggered by a UK company's cross-border provision of games simulating killing into Germany. The 'priority to fundamental rights' approach of the ECtHR is ill-suited to the 'dense quadrilateral connection'[134] of Member State A's fundamental right vs Member State B's fundamental right vs free movement vs EU fundamental right that operates in this new *supranational* context. Accordingly, the ECtHR might be amenable to an EU adjudicative model, such as balancing, that simply leaves enough space for all these competing interests to have a voice.

Nevertheless, the fact that a balancing model would be *less* problematic than the CJEU's current framework is not sufficient to defend the treatment of free movement as a fundamental right. O'Brien labels equal ranking 'the best approach on offer' but contends that the use of fundamental rights language to refer to the market freedoms is potently problematic since it 'demotes the importance of the person in herself [and]…treat[s] the market *as* morality'.[135] However, her argument centres on the ongoing link between economic activity and the activation of personhood at Union-level. As chapter four recognised, Union citizenship is at a crossroads whereby it must find a way to progress beyond its historical, market-focused beginnings and detach itself from free movement. Through its central tenet of equality, an updated Union citizenship, separate from the market, should require, *at the very least*, that where the Union cannot act, the Member States are given sufficient legal room to pursue fundamental rights goals for Union citizens, including those unable to trigger cross-border free movement rights.

It is submitted that balancing permits this breathing space and it is this issue on which we are currently focused. Although admittedly contentious, the proposed model acknowledges that

[133] C. Sabel, O. Gerstenberg, 'Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order', (2010) 16(5) ELJ 511, 513
[134] Nic Shuibhne, n.128, 246
[135] C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 CMLRev 1643, 1678

free movement has itself become about more than the market. For instance, where it runs congruent to fundamental rights, free movement can push beyond the objective of economic integration, providing new fundamental rights choices to individuals, offering an external check on Member State fundamental rights standards, and encouraging tolerance towards the Other.[136] Nevertheless, through reciprocal proportionality, balancing is also able to accommodate Member State activities that place an at times necessary brake on the excesses of free movement; that endeavour to provide protection for Union citizens who are unable to move and whose rights clash with free movement; and that recognise the often intrinsically stronger economic or societal position of free movers, thinking for instance of *Viking*. On the question of the relevance of free movement beyond the market, de Búrca argues, that the conclusions of the Advocate General in *Grogan*, that Irish restrictions on women's right to travel or their freedom from unsolicited physical examinations would be disproportionate,[137] 'can be seen as reflecting the view that such measures would unacceptably undermine values and freedoms which have an independent moral content in [Union] law'.[138] She posits that the question was not simply about restriction of trade, 'since individual freedom of movement has more than a commercial value'[139] and that the Opinion suggested that, within EU law, physical integrity, the moral autonomy, and freedom to travel of pregnant women was to be ranked at the same normative level as the protection of unborn life.

Nonetheless, we have also seen, over the course of previous chapters, that free movement is still a central tool of the internal market and is frequently prioritised over the fundamental rights goals of the Member States, or even the exercise of fundamental rights by individuals. It can be harnessed to strengthen the rights of actors who already enjoy a favourable position in society against those we might expect fundamental rights to protect. Yet, it is also utilised by economically inactive and/or disadvantaged individuals to access social support.[140] Balancing, through mutual impact assessment, embraces and makes room for these opposing roles of free movement. It recognises the part free movement can play in challenging Member State moral codes and tackling conceptions of the Other. Conversely, by requiring the courts to consider the impact of free movement on fundamental rights, it appreciates free movement's potential to undermine fundamental rights developed as a result of genuine

[136] Weiler, Lockhart, n.81, 604-605; see, respectively Case C-60/00 *Carpenter* [2002] EU:C:2002:434; Case C-159/90 *Grogan*, n.119; Case C-184/99 *Grzelczyk* [2001] EU:C:2001:458
[137] Opinion of AG van Gerven, Case C-159/90 *Grogan* [1991] EU:C:1991:249
[138] de Búrca, n.120, 299-300
[139] Ibid
[140] Case C-184/99 *Grzelczyk*, n.136

idiosyncratic or practical need. Balancing creates a useful system of *reciprocal* checks and balances between the supranational and national levels in recognition of the fact that neither the Union nor the Member States can be viewed as exclusive champions of fundamental rights. Having demonstrated that balancing deals well with the simultaneous status of free movement as *more than* the market, and yet still *connected to* the market, we will proceed to test free movement against broad theoretical frameworks.

It will be recalled from chapter one that the justification for the special protection of fundamental rights is frequently grounded in their universal nature. Thus, as Callewaert has argued, the question 'what makes fundamental rights fundamental' might broadly be answered by reference to the basic needs and dignity of the human being. Accordingly, fundamental rights should be enjoyed in the same way by the largest possible number of people and their fundamental nature is, thus, related to their universality.[141] The presentation of fundamental rights as reflecting universal basic human need, invites the accompanying claims that they are a-political, timeless absolutes, arising from natural law, by virtue of the uniqueness of being human.[142]

Free movement seems incapable of meeting these criteria. First, as a construct of the single market, free movement cannot be described as 'a-political', 'timeless', or 'natural'. Indeed, Spaventa has argued that 'the Treaty rights are instrumental to the achievement of a *political project*…Those rights would not, and do not, exist outside the Treaty providing for them' and are, consequently, different from fundamental rights.[143] Second, applying (generally) only to Union citizens, free movement rights are not of 'universal' application. I do not have the right to work in France by virtue of being human but rather because I am a UK national and, therefore, a Union citizen who enjoys movement rights pursuant to Articles 21 and 45 TFEU. My American friend cannot commence a job in France, relying on free movement rights, since they are (generally) unavailable to her. This hurdle is raised by the fact that *conditions*

[141] J. Callewaert, 'The European Convention on Human Rights and European Law: a long way to harmony', (2009) 6 EHRLR 768, 781-782
[142] For an overview in this regard, see C. Beyani, 'Reconstructing the universal: human rights as a regional idea', in Gearty, Douzinas, n.130, ch.9, 173-175
[143] E. Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', in S. Currie, M. Dougan (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart, 2009), 343, 255 [emphasis added]

are attached to the enjoyment of free movement, in the form of economic activity or self-sufficiency requirements.[144]

However, it will also be recalled from chapter one that universalism as a conceptual and definitional framework for fundamental rights is itself open to challenge. Crucially, it was argued that, in truth, even largely accepted fundamental rights can be viewed as the product of Western political philosophies.[145] Moreover, Koskenniemi has posited that the ongoing identification, meaning and applicability of rights are dependent on ongoing contextual assessments of the political good. This is particularly the case since fundamental rights are not, in reality, absolute because human rights instruments explicitly allow for derogations in the public interest, a necessarily political assessment.[146] Finally, the universal application of fundamental rights to all individuals is challenged by their focus on the freedoms of the property-owning individual to the exclusion of economically or socially disadvantaged groups.[147] Thus much of the criticism levelled at free movement is equally applicable to fundamental rights.

On the issue of universality of application, consider the right to vote, which features in numerous fundamental rights instruments.[148] Yet, this is not a fundamental right to which everyone has access at all times no matter in which country they find themselves. French citizens, for instance, cannot vote in elections to the UK parliament where their citizenship status does not allow it. Their right to vote in municipal and EU elections arises as a result of their EU citizenship.[149] The right to vote, therefore, is arguably linked to citizenship, rather than a right that one enjoys simply by virtue of being human. Nationality and age requirements also impose *conditions* upon the exercise of this right. This is also the case with a number of second generation, but nevertheless established, fundamental rights. The right to work, for instance, is enshrined in Article 15 CFR and Article 23.1 UN Declaration on Human Rights. However, in reality, the exercise of this right is again usually accompanied by various residence conditions and sometimes necessarily by age restrictions. The imposition of

[144] Ibid
[145] Beyani, n.142; A. Grear, ''Framing the Project' of International Human Rights Law: reflections on the dysfunctional 'family' of the Universal Declaration', in Gearty, Douzinas, n.130, ch.1, 26-27
[146] M. Koskenniemi, 'The Effect of Rights on Political Culture', in P. Alston et al (eds), *The EU and Human Rights*, (OUP, 1999), ch.3, 99
[147] C. Douzinas, 'The Poverty of (Rights) Jurisprudence', in Gearty, Douzinas, n.130, ch.3, 68-74
[148] E.g. Art.29 UN Convention on the Rights of People with Disabilities; Art.3, Protocol 1, ECHR; Art.25 International Covenant on Civil and Political Rights
[149] Art.22 TFEU

geographical and other limitations on fundamental rights weakens the argument that free movement cannot be treated as a fundamental right because it lacks universality. Moreover, in any case, in *Baumbast*, the CJEU has restricted limitations on free movement as a result of their centrality to Union citizenship.[150]

Alternatively, universal application can be reconfigured. Thus, it might be met where a right is available to all human beings but its exercise is restricted to a certain geopolitical area. Hence, *all* human beings enjoy a right to vote. French citizens may vote in France. The fact that they are not able to vote in the UK's national parliamentary elections does not change the fact that they have a right to vote *somewhere* and thus does not undermine the universality of that fundamental right. By contrast, it might be argued that since freedom of movement is a construct of the EU legal order and is (generally) only available to Union citizens, that it is not universal. Yet, Article 2, Protocol 4 ECHR provides that 'everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. Everyone shall be free to leave a country, including his own'. However, since it is restricted by state borders, this right can only be interpreted as a right to move *somewhere* as opposed to *everywhere*. My Texan friend, as a US citizen, has the right to move anywhere within the United States and the right to exit the US. But she does not have the automatic right to move to and reside in France, simply by virtue of being human.[151]

It is argued here that the EU has created a new geopolitical area in which Union citizens' right to move *somewhere* is extended beyond Member State borders to the entire EU region. My French friend is free, in principle, to move around the Union in the same way as my Texan friend can move freely within the US. A third country national may not have the free movement rights of a Union citizen, but neither does a Union citizen (usually) have the automatic right to enter the US. Freedom of movement in this sense should not be downgraded from rights status in the EU context simply because EU law has blurred the boundaries of the nation state or because the Union, as a geopolitical area, is younger than regions such as the US or, for instance, the UK. Indeed, the Court of Justice, in *Rutili*, presented free movement rights as a 'special manifestation of the more general principle, enshrined in [*inter alia*] Article 2, Protocol 4'.[152]

[150] Case C-413/99 *Baumbast* [2002] EU:C:2002:493
[151] Although a Schengen visa would allow movement between most EU Member States
[152] Case 36/75 *Rutili* [1975] EU:C:1975:137, para.32

More recently, the CJEU asserted in *Ruiz Zambrano* that Union citizens cannot be deprived of the genuine enjoyment of the rights conferred by virtue of their status as Union citizens.[153] The Court has stated that this has an 'intrinsic connection' to free movement.[154] The clearest example of these rights to date is the right not to be forced from Union territory.[155] Thus, *Ruiz Zambrano* suggests the creation of a new geopolitical space that Union citizens have a right to be on and move around within. Within the commentary, Lemmens has remarked that '[i]nsofar as [Article 45 CFR] applies to freedom of movement and of residence within the territory of a given State, it has to be read in the light of Article 2 Protocol 4 [ECHR]'.[156] This approach can be seen as conforming to Griffin's theoretical model of different levels of abstraction with fundamental rights. For instance, the freedom of the press might not be considered a *universal* right, since it is irrelevant in societies where the press simply does not exist, but it can be viewed as an abstraction of the freedom of expression, which *is* universal. Thus, lower levels of abstraction are more culturally specific, relating to specific social and temporal circumstances.[157] Accordingly, EU movement rights can be seen as best reflecting the present concerns of the Union at the necessary level of abstraction.

We can also test free movement against the notion of fundamental rights as a-political and a-historical reflections of the minimal tools that rational actors need to co-exist and exercise their normative agency.[158] Nino has described human rights as referring to:

(i) The opportunity for the holder of the right to perform or not perform a certain action;
(ii) The exclusion of actions of third parties which involve some harm to the holder of the right, or the requirement placed on third parties that they do something that involves a benefit for the rights holder;
(iii) The enjoyment of some good or the avoidance of some evil.[159]

[153] Case C-34/09 *Ruiz Zambrano* [2011] EU:C:2011:124, para.42
[154] Case C-40/11 *Iida* [2013] EU:C:2012:691, para.72
[155] Ibid; Case C-256/11 *Dereci* [2011] EU:C:2011:734
[156] P. Lemmens, 'The Relationship between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights – Substantive Aspects', (2001) 8 MJECL 49, 64-65
[157] Griffin, n.131, 38, 50
[158] See ch.1, s.4.2
[159] C. Nino, *The Ethics of Human Rights* (Clarendon, 1991), 30

Arguably, the free movement provisions conform to (i) since they enable rights-holders to move freely within the Union, to provide services, to establish businesses, to sell goods and to transfer capital around Europe. Moreover, regarding (ii), Member States are precluded from depriving rights-holder of this opportunity by imposing discriminatory rules and in many cases, by restricting market access. Post-*Spanish Strawberries/Schmidberger*, there is even a *positive* obligation on the Member States to ensure the free movement rights of Union citizens/traders.[160] Whether the exercise of free movement represents a 'good' or avoids an 'evil' is more debatable since the content of those terms are themselves continually open to interpretation. Günther argues that they require the existence of 'negative experiences' that are overcome by the recognition of human rights.[161]

Specifically, it will be recalled from chapter one that Günther describes human rights as 'the rejection of a concrete historical experience of injustice and fear, caused by actions of the State'. This itself poses a challenge to claims that fundamental rights are a-historical since, if they represent the recognition of the articulation of suffering, they 'can never be completely and comprehensively declared…'[162] On the one hand, this weakens the argument that free movement cannot enjoy fundamental rights status because it is not a-historical. However, since the focus of Günther's discussion of 'injustice and fear' is on the events of the Second World War and on colonisation, it seems inappropriate to term the inconvenience of restrictions on free movement within such a category.

Nevertheless, Günther later broadens his characterisation of injustice, noting that, '[i]t at least makes sense to claim that negative discrimination and social exclusion by reason of gender, race, religion or other human properties are not a misfortune and not the victim's own fault, but injustice… It is part of European history that some people began at some time not to take social exclusion by reason of birth as given by the nature of God but demanded that any such exclusion be justified'.[163] Arguably, *personal* free movement rights, especially those arising from a combined reading of Articles 18 and 21 TFEU on non-discrimination and the right to freedom of movement of Union citizens, fall within this category. They highlight the injustice faced by Union citizens, living in host States, where they do not have access, for instance, to

[160] Case C-265/95 *Commission v France* [1997] EU:C:1997:595; Case C-112/00 *Schmidberger*, n.49
[161] K. Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture', in Alston, n.146, ch.4, 124
[162] Ibid, 127
[163] N.161, 127-132

social security, state education, healthcare, on the same basis as host State nationals, purely by reason of nationality.[164]

Chapter one also challenged the conceptual underpinning of fundamental rights as the a-historical rational 'discoveries' of the self-interested individual, arguing that their existence and justification could lie in their ability to reflect a societal response to the 'rapid progress of sentiments'.[165] Thus, the gradual expansion in fundamental rights, to reflect changing social attitudes with regard to, for instance, the marriage rights of transsexuals and homosexuals, female physical autonomy in relation to abortion, and the growing importance of environmental and consumer protection, demonstrates that 'there can be no "timeless" core' of fundamental rights.[166] This further weakens the use of universalism to challenge free movement's potential fundamental rights status.

Finally, in relation to the a-political requirement, the operation of doctrines such as the ECtHR's margin of appreciation allows the scope of fundamental rights to be defined by political context. Thus, the idea of fundamental rights as a-political is something of a fallacy. Weiler and Lockhart have underlined that fundamental rights are rarely absolute.[167] Like the free movement provisions, they are usually accompanied by derogating provisions. Thus, '*their very definition* almost invariably involves a balance between competing interests…'[168] Further, States often place dissimilar emphases on different rights according to their historical, social, and cultural backgrounds. For instance, states might draw differing balances between the competing rights of Article 8 and 10 ECHR, concerning the rights to privacy and expression respectively. Likewise, Germany, and now the EU, respects the right to human dignity as a separate fundamental right,[169] while elsewhere it is generally presented as an overarching justification for *other* fundamental rights.

[164] Although the *process* by which free movement can achieve this is arguably still limited by its ongoing attachment to economic activity or economic self-sufficiency. See O'Brien, n.135. Consider also the recent Case C-333/13 *Dano* [2014] EU:C:2014:2358. This does not necessarily diminish free movement's potential status as an aspirational fundamental rights 'mission statement' in the sense articulated in chapter one.
[165] R. Rorty, 'Human Rights, Rationality and Sentimentality' in S. Shute, S. Hurley (eds), *On Human Rights,* (Basic Books, 1993), 122
[166] C. Gearty in *Principles of human rights adjudication,* (OUP, 2004), 86-87
[167] Weiler, Lockhart, n.81, 585
[168] Ibid
[169] Case C-36/02 *Omega*, n.8; Art.1 CFR

This is directly translatable to the free movement provisions, which whilst clearly formed as part of a political project, have increased but also *broadened* in constitutional significance over time. The Preamble to Regulation 1612/68 concerned with 'the freedom of movement for workers within the Community' described free movement as 'a fundamental right of workers and their families'. The Maastricht Treaty introduced freedom of movement as the central right of the Union citizen, via Article 21 TFEU. The Court has described the Union citizen's right to move as 'fundamental'.[170] It also frequently refers to the free movement provisions as 'fundamental freedoms', a term it uses also in relation to fundamental rights such as the freedom of expression.[171] Most recently, the Charter mentions all four of the Treaty freedoms in its Preamble. Further, pursuant to Article 15 CFR, 'every citizen has the freedom to seek employment, to work, to exercise the right of establishment, and to provide services in any Member State'. Under Article 45 CFR, 'every citizen has the right to move and reside freely within the territory of the Member States'. If individual Member States - such as Germany with its independent protection of human dignity or Ireland which includes the unborn child in the fundamental right to life - are permitted independently to isolate societal values as fundamental rights, why should this not be the case within the Union legal order?

Clearly, though, the German right to human dignity is more closely grounded in Günther's concept of 'injustice and fear' than is the realisation of a political project through free movement. And yet, as noted above, many established civil and political rights reflect political ideals. For instance, the right to property complements capitalism, betraying a hegemonic approach to what constitutes a fundamental right. The ongoing differentiation between the normative force of civil and political rights, on the one hand, and economic and social rights, on the other is also testimony to this.[172]

Accordingly, as chapter one noted, Koskenniemi has argued that 'rights are constantly examined, limited and criticised from the perspective of alternative notions of the good. This is evident particularly [in]…the relationship between rights and exceptions to them and the

[170] Case C-200/02 *Chen* [2004] EU:C:2004:639, para.33
[171] Discussed by M. Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in Alston, n.146, 449, 452
[172] Consider, the Charter which, despite being praised for addressing this issue, still distinguishes between 'rights' and 'principles' in Art.52(5)

indeterminacy of rights'.[173] Within the context of the Union, where free movement acts as an essential tool for the achievement of an internal market and as an individual right of the Union citizen, it represents a 'good' to be promoted within that legal order. Indeed, Koskenniemi welcomes the honesty of the CJEU in *Hauer* for explicitly stating that fundamental rights face restrictions corresponding to the objectives of the Union.[174] For him, fundamental rights are themselves defined by their political contexts. He argues that 'policies are needed to give meaning [and] applicability…to rights' and that 'what is recognised as a fundamental right always reflects a political preference'. Given the constitutional significance of free movement within the Union's legal order, then, equal ranking between free movement and (other) fundamental rights, might be inevitable. Accordingly, the usefulness of balancing lies in its representation of the political reality of supranational dynamics and its creation of a forum for differing notions of the political good. This is especially significant where free movement *causes* tension between different Member States' competing visions of the 'good', thinking of cases such as *Omega*, and *Grogan*.[175]

Given the broadening purpose of free movement within the Union, and the explicit reference to it as a fundamental right by both the Court and within EU primary law, by virtue of the Charter, the use of equal ranking between free movement and fundamental rights might best reflect the former's constitutional significance within the Union legal order. It might also represent better the political and legal matrices faced by the CJEU and the domestic courts, attempting to grapple with, and to reconcile, competing visions of the political good. This also conforms to the definitional approach taken to fundamental rights in the thesis generally. In chapter one, discussion of the justification for the special protection of fundamental rights concluded that this was warranted simply by virtue of their existence as a social fact. By means of positive legal instruments, States have committed themselves to respecting stipulated fundamental rights, regardless of theoretical debates as to whether or how they exist. Indeed, as chapter one noted, Hoffmann has remarked that 'once a fundamental right is enshrined in a domestic constitution…the question of foundations becomes immaterial'.[176] As a result of its constitutional significance, and the language used by the Court and in the Charter, free movement as a fundamental right exists as a social fact within the EU legal order.

[173] Koskenniemi, n.146, 105
[174] N.160, 111; Case 44/79 *Hauer* [1979] EU:C:1979:290
[175] Case C-36/02 *Omega*, n.8; Case C-159/90 *Grogan*, n.119
[176] Hoffmann, n.130, 83-84

However, the extent to which *all* of the free movement provisions enjoy this enhanced constitutional significance is contestable. Certainly, the Court has expressly stated that the free movement of Union *workers*[177] and *citizens*[178] is a fundamental right. The Charter also unambiguously includes the free movement rights of individuals, in their capacity as citizens, workers, work-seekers, service providers, and establishers.[179] However, as Nic Shuibhne notes 'things are more controversial when the discussion turns to the more general (fundamental) right to *trade*, as expressed through the free movement of goods…'.[180] If one is to root free movement in the legal reality of its constitutional position, then it should be noted that a case-law review was unable to locate more than one instance in which the non-personal free movement provisions were referred to as 'fundamental rights'.[181]

Nevertheless, for a number of reasons, it is argued that even the non-personal free movement provisions deserve recognition as a 'fundamental something' warranting equal status to fundamental rights. First, the non-personal free movement provisions can represent new levels of abstractions for (generally) accepted fundamental rights. Trstenjek and Beysen are particularly strong proponents of this argument. They posit that:

'Since the free movement of goods applies in essence to goods that are owned by a natural or legal person, the EU fundamental right to property can be assessed as part of the foundation on which the free movement of goods is based. As far as the substantive guarantees inherent in certain fundamental rights coincide with the substantive guarantees of the fundamental freedoms, those fundamental rights can also be relied upon to bolster the effective enforcement and implementation of the fundamental freedoms in the Member States.'[182]

[177] Case C-222/86 *Heylens* [1987] EU:C:1987:442, para.14; Case C-415/93 *Bosman* [1995] EU:C:1995:463, para.129
[178] Case C-200/02 *Chen*, n.170
[179] Arts.15 and 45 CFR
[180] N.84, 235
[181] P. Oliver, W. Roth, 'The internal market and the four freedoms' (2004) 41 CMLRev. 407, citing Case C-228/98 *Dounias v Ypourgio Oikonomikon* [2000] EU:C:2000:65, para.27; see also N. Nic Shuibhne, 'The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?' in C. Barnard, O. Odudu (eds), *The Outer Limits of European Union Law*, (Hart, 2009), 167, 184-185. Though, as previously noted, in Case 158/80 *Rewe v Hauptzollamt Kiel* [1981] EU:C:1981:163, the Court also explicitly presents the free movement of goods, at p.1815, as forming part of the fundamental right to pursuing a trade without interference. However, this does not appear in the French or German versions of the case.
[182] Trstenjak, Beysen, n.63, 309-310. Indeed, the English language of Case 158/80 *Rewe v Hauptzollamt Kiel* suggests this possibility, ibid.

They argue, similarly, that Articles 15 and 16 CFR, concerning, respectively, the fundamental rights to choose an occupation and to conduct a business, support the implementation of the freedoms of establishment and services.[183]

Second, the non-personal free movement rules can be viewed as key tools for facilitating the general right to move of EU citizens. Thus, Tryfonidou has argued, in the context of goods, that 'a fully-fledged citizenship appears to be requiring the Union to grant a number of minimum rights to all its citizens, including the (economic) right to freely conduct a commercial activity – to trade – in an inter-state context'.[184] Similarly, Horsley has recently remarked that the free movement of capital:

'[does] not simply ensure, for the benefit of corporate investors…that financial resources are free to be directed towards the most favourable investment environment within the internal market. 'Capital movements' also cover, *inter alia*, property purchases, mortgages, inheritances, and personal loans – routine economic transactions for millions of mobile Union citizens'.[185]

Thus, although still subject to much doubt,[186] even the free movement of capital can be viewed as facilitating the free movement rights of Union citizens. Arguably, then, the non-personal free movement provisions should also be treated as equal to fundamental rights.

Nevertheless, a sizeable section of the literature argues that we should distinguish between personal and non-personal freedoms. Weiler has suggested that 'perhaps a distinction could, and should, be drawn especially in relation to fundamental human rights, between provisions dealing with the situation of real human beings and that dealing with goods'.[187] Further, as noted in chapter four, Nic Shuibhne views Union citizenship as emphasising the person/trade dichotomy 'all the more sharply'. She finds Tryfonidou's reasoning problematic 'when the consequence is a general 'right to do business everywhere in the Union' leading to related

[183] Ibid; see also F. Dorssemont, 'How the European Court of Human Rights Gave Us *Enerji* to Cope with *Laval* and *Viking*' in Moreau, n.64, 211, 230-231
[184] A. Tryfonidou, 'Further Steps on the Road to Convergence', (2010) 35(1) ELRev 36, 44. See also Opinion of AG Poiares Maduro in Joined Cases C-158/04 and 159/04 *Alfa Vita* [2006] EU:C:2006:212
[185] T. Horsley, 'Death, Taxes and (Targeted) Judicial Dynamism: The Free Movement of Capital in EU Law', in A. Arnull, D. Chalmers (eds), *The Oxford Handbook of European Union Law*, (OUP, forthcoming), ch.23
[186] J. Coppel, A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 CMLRev 4 669, 690-691
[187] J. Weiler, 'Thou Shalt Not Oppress a Stranger: On the Judicial Protection of Non-EC Nationals – A Critique' (1992) 3 EJIL 65, 81

questions about whether the Union seeks the general deregulation of the market.[188] It is submitted that this problem is intrinsic to free movement's Janus-like nature. In the same instance, free movement represents a genuine resource to individuals but also plays its part in favouring the pursuit of commerce over other legitimate endeavours. A balancing model, which allows different supranational and domestic aims to be tested against each other, creates a forum where this can be recognised.

Finally, as discussed above, the exercise of *both* personal and non-personal free movement rights can lead to conflict between competing concepts of fundamental rights *beyond* the right to move. Thus, for instance, *Grogan* can be interpreted as representing two Member States' competing views on the right to life; *Familiapress* on the right to freedom of expression;[189] and *Omega* on human dignity. This conflict arises *as a result* of free movement. Since it is also free movement that gives the CJEU jurisdiction to assess a fundamental rights issue, bestowing normative equality on free movement creates a balanced legal space within which these competing fundamental rights standards can be tested.[190]

Although this work has been focused on the potential danger posed by free movement to the protection of fundamental rights, usually at the national-level, it is overly simplistic to present the Member States as an overarching 'good' for fundamental rights, and free movement as some kind of constant, malevolent threat. As demonstrated above, free movement can also provide a means for Union citizens to challenge the fundamental rights standards of their Member State and/or utilise the right to move to access the preferred fundamental rights 'packages' of other Member States.[191] A balancing model, which uses mutual impact assessment to execute *reciprocal* checks and balances on both EU and competing Member State fundamental rights standards embraces this complexity. Member States, having willingly signed up to the EU, must offer some give and take in their fundamental rights definitions as part of that commitment. For instance, where Member States have different fundamental rights methods that ultimately reach the same goal, they must become flexible in their fundamental rights approaches. As de Witte points out, 'By choosing a 'maximum standard' of protection, the Court of Justice would in fact be privileging [say] the German

[188] Nic Shuibhne, n.84, 32-36
[189] Case C-368/95 *Familiapress* [1997] EU:C:1997:325
[190] See also Nic Shuibhne, n.128, 244-245
[191] Nic Shuibhne, n.128

over the Swedish approach, and there is no obvious reason why this should be so'.[192] Within the context of a common market, it is also never clear which fundamental rights option is the 'most' protective.[193] Assessing the impact of fundamental rights on free movement (and congruent fundamental rights) allows for this. Conversely, where the particular scope of a fundamental right within a Member State meets an idiosyncratic need within that Member State, or reflects a complex, programmatic system of fundamental social rights protection, for which that Member State has competence, the assessment of the impact of free movement on fundamental rights will account for this.

For those who find it intuitively difficult to connect economic freedom to trade with *human* rights, it is worth noting that *fundamental* rights are traditionally broader than *human* rights. De Witte has noted that the latter term is a 'potentially broader notion…embracing those rights recognised in the *constitutional* law of the Member States of the EU'.[194] This is comparable to the difference between Menschenrechte and Grundrechte in German law. In short, the diverse and complex constitutional significance of *all* of the free movement provisions warrants their treatment as (or equivalent to) fundamental rights. Where non-personal free movement rights represent the needs of economic integration more than the requirements of the Union citizen, the impact of the pursuit of conflicting fundamental rights on their realisation should be viewed as lower.

This section has argued that the justification for treating free movement as a fundamental right largely lies in its constitutional significance within the EU legal order, since fundamental rights are always defined by their political, social, cultural, historical, and economic context. Their purpose is to shine a spotlight on those goals that are important to a particular society. Since the Union is made up of 28 different societies, all with differing ideas about the political 'good', while *also* developing *its own* notions in that regard, this fundamental rights spotlight shines on a number of competing goals. A judicial architecture, which recognises the inherent but also changeable worth of all of these aims within the individual Member States and the Union, is needed to address this complex dynamic. It is argued here that a balancing model provides an appropriate forum for this to occur.

[192] B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Alston, n.146, ch.27, 881
[193] Consider e.g. opposing views on the fundamental right to life and female autonomy in relation to abortion in Case C-159/90 *Grogan*, n.119
[194] N.192, 860

5. Conclusion

Tasked with offering an alternative to the constitutionally outdated breach/justification adjudicative methodology, this chapter has forwarded balancing as a model more suited to the contemporary constitutional framework. It focused, first, on the emerging use of balancing by the CJEU, in the context of secondary legislation, and by the ECtHR when two fundamental rights clash against each other. It was argued that a starting point, in which competing norms are of *equal rank,* invites courts to ask new proportionality questions. In particular, courts seek to *reconcile* and find *compromise* between conflicting rules, attempting to find an outcome that is least restrictive of both norms. Crucially, the adoption of such an approach in primary free movement law would create sufficient legal space for consideration of the Union's fundamental rights commitments as well as to lessen the trio of negative fundamental rights impact highlighted throughout this thesis. It was advanced that, through overarching guidelines, the CJEU could play a critical role in explaining the impact that Member State activity can have on the internal market and in reminding the Member States of their obligations under the Treaties. National courts, as agents of the EU judicial system and forming part of the national judiciary, are, nevertheless, best placed to conduct the final analysis. Relying on legal positivism and the existence of fundamental rights as 'social facts' rather than universal truths, it was argued that the treatment of free movement as a fundamental right should not be viewed as conceptually problematic but rather representative of the political and legal reality of the Union legal order.

Chapter Six

CONCLUSION

Ever since the CJEU was explicitly confronted with reconciling conflicts between the Treaty free movement provisions and fundamental rights in *Schmidberger* it has faced persistent criticism that its adjudicative approach procedurally subjugates the latter to the former.[1] Specifically, criticism is levelled at the Court's use of a two-stage breach/justification methodology, which requires fundamental rights measures to *justify* themselves against *prima facie* breaches of EU law. This inherently associates the protection of fundamental rights with wrongful conduct. Treating fundamental rights as derogations from free movement, it also exposes them to a proportionality test that requires them to be interpreted strictly; their suitability and necessity being assessed by reference to whether there are means of protecting them that are less restrictive of free movement.[2] However, these criticisms have not been accompanied by a large-scale assessment of exactly why this framework is problematic in broader constitutional terms beyond the assumption that subjugating fundamental rights is inherently inappropriate.[3] Nor have the origins of this procedural bias been fully explored. And yet, not only are these diagnostic questions significant in and of themselves, they are also crucial precursors to identifying the need for, and the suitability of, alternative models of adjudication.

This thesis has plugged this gap in the literature. It has demonstrated that the two-stage model is the product of the Union's economic roots. Since the central purpose of the Rome Treaty was economic integration through the creation of the common market, and a key tool in the achievement of this was the free movement of goods, workers, services/establishment, and

[1] C. Brown, 'Case C-112/00, *Eugen Schmidberger, Internationale Transporte und Planzüge v. Austria*. Judgment of 12 June 2003, Full Court.', (2003) 40 CMLRev 1499, 1508; C. Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 CLJ 262; P. Sypris, T. Novitz, 'Economic and social rights in conflict: political and judicial approaches to their reconciliation' (2008) 33(3) ELRev 411, 424-425

[2] Case C-36/02 *Omega* [2004] EU:C:2004:614, para.30; Case C-244/06 *Dynamic Medien* [2008] EU:C:2008:85, para.42; Case C-438/05 *Viking* [2007] EU:C:2007:772, para.46 and 81; Case C-341/05 *Laval* [2007] EU:C:2007:809, para.117

[3] Though there is a rich literature on the effects of the bias in different legal areas. See for instance, S. Currie, 'Men on the Sidelines: The Reconciliation of Work and Family Life Agenda in the Context of Cross-Border Posting, (2013) 35(3) J. Soc. Wel. & Fam. L. 389; A. Dashwood, '*Viking* and *Laval*: issues of horizontal direct effect' (2007-2008) CYELS 525; N. Reich, 'Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ' (2008) GLJ 159; Sypris, Novitz, n.1

capital between the Member States, it was logical to prioritise free movement over conflicting law and policy. Crucially, since the market freedoms were not initially directly effective and could only be triggered by protectionist and/or directly discriminatory Member State conduct, they were generally unlikely to interact with fundamental rights. Indeed, the Rome Treaty made no provision for the protection of fundamental rights within free movement's derogating articles or the wider Treaty text. Rather the free movement provisions were most likely to interact with precisely the type of domestic activity that the Member States agreed to eradicate when they created the EEC. The structural presentation of such conduct as *prima facie* wrongful under Union law, and the procedural requirement that it defend itself by reference not only to the legitimacy of its endeavours, but also the proportionality of its implementation, was therefore understandable.

And yet, free movement has expanded so as to come into more frequent contact with fundamental rights. Moreover, the Court has retained the two-stage model to address these types of interaction. This introduces a number of questions: do fundamental rights prevail under this framework; is that enough; if not, why is this model problematic from practical, theoretical and Union constitutional perspectives; what has caused the rise in the volume of interactions between free movement and fundamental rights and why has the breach/justification model nevertheless been retained; finally, what alternatives are there to this adjudicative approach and are they a better fit for the Union's contemporary constitutional framework?

Chapter one argued that, although there are examples in the case-law in which, in terms of final outcome, fundamental rights have triumphed over the free movement provisions,[4] this was not enough to negate the need for investigation into the *process* of decision-making or its effects. Crucially, a quantitative analysis of the case-law would fail to provide an adequately comprehensive picture of the qualitative impact of a structural preference for free movement in those cases where free movement prevails. Moreover, while fundamental rights constituted justified restrictions of free movement in *Schmidberger, Omega* and *Dynamic Medien*,[5] this was *in spite of* rather than because of the Court's two-stage assessment.

[4] Case C-112/00 *Schmidberger* [2003] EU:C:2003:333; Case C-36/02 *Omega*; Case C-244/06 *Dynamic Medien*, n.2
[5] Ibid

Accordingly, a significant contribution of the thesis was to explore some of the practical consequences of the breach/justification model for the protection of fundamental rights. It underlined that in interactions between free movement and fundamental rights, only the latter faces questions of proportionality. This is assessed by reference to the 'suitability' and 'necessity' of the fundamental rights measures, which in turn is generally judged according to whether there are means less restrictive of free movement available to secure that goal. Since a breach of free movement has already been established, generally through low evidentiary burdens such as whether free movement is liable to be less attractive as a result of the opposing measure, there is limited room in the proportionality assessment for consideration of the effects of free movement on fundamental rights. Thus, the analysis identified a trio of fundamental rights consequences flowing from assessing the proportionality of free movement through this free movement lens. First, a specific approach to fundamental rights might be needed within a particular Member State that faces idiosyncratic fundamental rights issues. As one example, a certain approach to protecting the fundamental right to freedom of expression might be required in a Member State that suffers from an unusual paucity of press diversity.[6] Second, the structural prioritisation of free movement also limits capacity for consideration of the fact that some rights, such as the fundamental right to strike, are, in certain situations, inherently limiting of free movement such that measures less restrictive of free movement will automatically reduce the effectiveness of exercising the fundamental right concerned.[7] Third, means less restrictive of free movement that appear suitable in principle might not be feasible in practice when logistical, financial, administrative, or other considerations are taken into account. Critically, the free movement focus of the proportionality test isolates the issue from the complex legal environments in which many programmatic fundamental rights are situated.

Chapter one acknowledged that the existence, scope, content and normative positioning of fundamental rights is the subject of intense debate at the theoretical level. This raises the question of whether the structural prioritisation of free movement over fundamental rights is actually problematic, especially from the perspective of legal positivism, since the internal market is clearly a core objective within the written text of the Treaty. The chapter posited that the theoretical justification for viewing the procedural preference for free movement as inappropriate lies in the social fact of the Union's explicit commitment to fundamental rights

[6] Case C-368/95 *Familiapress* [1997] EU:C:1997:325
[7] Case C-438/05 *Viking*; Case C-341/05 *Laval*, n.2

pursuant to Article 6 TEU, the Charter, and the general principles. As Hoffmann has remarked, this 'suspends the essential contestability of human rights' and instead introduces questions of legal compliance.[8] Consequently, the fundamental rights obligations that the Union imposed upon itself, through the agreement of its Member States, provided a theoretical justification for testing whether the Union had succeeded in meeting its own pledges.

This theoretical justification necessarily led to the need to interrogate the constitutional implications of the procedural preference for free movement in the contemporary context. Thus, having charted the evolution of the Union's aims beyond economic integration, the chapter demonstrated that the Court's current adjudicative framework is ill-suited to the present-day constitutional needs of the Union. In particular, the conferral of only shared or complementary competence on the Union in relation to some of its new goals, such as social policy, public health, or education, which overlap with fundamental rights concerns, necessitates a model that permits the Member States sufficient space to pursue these objectives, away from the shadow of a potential breach of free movement. The structural subjugation of fundamental rights is also particularly unsuitable in the post-Lisbon era in which the Union is obliged formally to accede to the ECHR and in which primary law status is conferred on the Charter. The cases of *Viking* and *Laval* were contrasted against the ECtHR cases of *Demir* and *Enerji* to demonstrate the existence of a systems clash between the adjudicative approach of the Luxembourg and Strasbourg Courts.[9] Indeed, commentators have argued that the CJEU's current adjudicative framework is 'fundamentally irreconcilable' with the approach of the ECtHR.[10]

Since the theoretical justification for the importance of fundamental rights was grounded in their existence as a social fact in the Union legal order, and in their ability to shine an important spotlight on the legitimate (often Union-endorsed) demands placed on Member States beyond economic integration, a conscious choice was made to define fundamental rights broadly within the thesis. This allowed the thesis to test the Union's ability to meet its own commitment to the broad range of fundamental rights recognised by the Charter, which

[8] F. Hoffmann, 'Foundations beyond Law', in C. Gearty, C. Douzinas (eds), *The Cambridge Companion to Human Rights Law*, (CUP, 2012), ch.4, 83-84
[9] *Demir v Turkey*, App.no:3450397; *Enerji v. Turkey*, App.no:68959/01
[10] A. Veldman, 'The Protection of the Fundamental Right to Strike within the Context of the European Internal Market: Implications of the Forthcoming Accession of the EU to the ECHR', (2013) 9 ULRev 104, 121

incorporates fundamental rights of a civil and political nature, but also economic and social rights, as well as third generation solidarity rights. What emerged from this approach was that analysis of the subjugation of fundamental rights to the free movement provisions in fact serves as a useful case-study for broader, but equally important, questions relating to the relationship between Union and domestic law and to how provisions of Union primary law interact with each other.

Chapters two, three, and four explained why the free movement provisions interact more frequently with fundamental rights than was seemingly first anticipated and why, nevertheless, a two-stage approach has been retained to address these types of conflict. All three chapters demonstrate an irony inherent within a trinity of key constitutional evolutions that have increased the likelihood of conflict between free movement and fundamental rights, and yet also entrenched or even exacerbated a structural preference for free movement. Thus, chapter two mapped the evolution of the material and personal scope of free movement. It demonstrated that as the notion of a breach of free movement has evolved so as to incorporate indistinctly applicable measures or rules restricting market access, free movement has inevitably begun to clash more frequently with domestic fundamental rights measures. The extension of the personal scope of the free movement provisions has had similar consequences. Although the Court recognised, in a substantive sense, through the mandatory requirements, that this expansion of free movement brought it into contact with Member State policy only tangentially related to the internal market, no adjustment was made to the structure of the Court's adjudicative methodology. Crucially, this meant that the interactions between free movement and fundamental rights, which were triggered by free movement's wider scope, were still processed through the two-stage model, whereby fundamental rights are interpreted strictly, according to questions of suitability and necessity. Importantly, chapter two emphasised the widening disparity in evidential burden between establishing a *prima facie* breach of free movement and demonstrating that it is justified. While no *de minimis* standard generally operates in relation to a breach of free movement, fundamental rights must frequently overcome a 'seriousness' threshold with Member States often being required to provide statistical evidence of substantial interference.

Chapter three highlighted both the indirect and direct contributions that the doctrine of direct effect has made to the reinforcement of the structurally imbalanced breach/justification methodology. Specifically, it argued that the *Van Gend* criteria for the conferral of direct

effect presents the free movement provisions as 'unconditional' and 'precise'. Accordingly, the Treaty provisions permitting limitations on the exercise of free movement and the mandatory requirements must be viewed as derogations from the free movement provisions rather than conditions for their exercise. Moreover, the capacity of secondary Union legislation to incorporate fundamental rights considerations into the *definition* of free movement becomes limited by the presentation of primary free movement provisions, which might originally have been viewed as programmatic in nature, as precise. Fundamental rights are therefore positioned in opposition to precisely defined and unconditional Union law. The indirect contributions that direct effect has made to structural imbalance have been given teeth by the accompanying doctrines of primacy and effective judicial protection, which require the immediate setting aside of conflicting domestic fundamental rights measures. This creates the risk of a legal lacuna in fundamental rights provision. The availability of damages for violations of free movement can also have a chilling effect on the exercise of those fundamental rights that pose potential obstacles to free movement, as evidenced in the BALPA saga. Finally, direct effect has also made a distinct contribution to tensions in the free movement/fundamental rights dynamic. The extension of the free movement provisions from vertical to horizontal direct effect has created new opportunity for interaction between free movement and fundamental rights that would otherwise not arise, as famously demonstrated by the *Viking* and *Laval* cases. Crucially, private parties appear to have to go further to defend their exercise of fundamental rights than do public actors. Thus, in *Schmidberger*, Member State protection of the fundamental rights to freedom of expression and association were sufficient on its own to justify, in principle, the restriction of the free movement of goods. By contrast, in *Viking* and *Laval*, the fundamental right to strike had to be accompanied by a legitimate aim, namely worker protection, before it could even be justified in principle. Moreover, since the focus of the derogating provisions is on the activity of public bodies, they are at times ill-adapted to the justificatory needs of private actors. This can even be relevant to mandatory requirements since the Court, in *Laval*, limited the capacity of private actors to pursue worker protection in the public interest.

The final arm of our constitutional trinity was Union citizenship. Departing from the extensive literature that argues that Union citizenship does not go far enough in safeguarding the fundamental rights of Union citizens, chapter four highlighted a potential danger in trying to secure fundamental rights protection through the medium of EU citizenship. Specifically, it demonstrated that, since it is borne from, and built upon, the internal market, adopting free

movement as the core right of the EU citizen, Union citizenship has infused free movement with a fundamental rights quality in both the personal and economic spheres. This inevitably welcomes the structural prioritisation of free movement. Union citizenship has also caused more instances of both congruence and clash between free movement and fundamental rights. While clearly rights-enhancing in the context of congruence, since Union citizenship is only able to support fundamental rights as a corollary of the structural boost it offers free movement, in instances of clash it is not only unable to assist individuals but actually operates to undermine domestic programmatic protection of fundamental rights.

Chapter four argued that this phenomenon leaves Union citizenship at a cross-roads. Either it must evolve so as to allow the fundamental rights issues created by market deregulation to be addressed at EU-level, or, at the very least, it should develop, through its central tenet of equality, to ensure that it does not diminish Member State efforts to protect fundamental rights. In this sense, Union citizenship is a microcosm of a broader constitutional challenge facing the wider Union legal order. How should the present-day Union, which claims to respect fundamental rights and which has broad objectives, ranging from the internal market to social policy, from education to judicial cooperation in civil and criminal matters, manage the relationships between those sometimes conflicting aims? Further, since the Treaties do not pursue these goals in a uniform manner but instead divide labour between the supranational and domestic levels, how should clashes between Union and domestic law be presented? Specifically, can tensions between free movement and domestic law always be viewed as conflictual if national measures also fulfil Union objectives featured in a different part of the Treaty? If the conclusion is that they remain opposed to one another, then the Union's legislative bodies must act to ensure that legitimate concerns, which can no longer be addressed at domestic-level, are met by supranational action. And yet, the capacity of the Union legislature to act might itself be limited by its legislative competence and/or the political will of the Member States to concede that an issue should be supranationally managed.[11] The alternative is for the Court to alter its adjudicative methodology so as to allow the Union to 'back off' in certain situations where the Member States pursue goals domestically, which the Treaties consider legitimate, but which inevitably restrict free movement.

[11] Consider the use of the Lisbon 'yellow-card' procedure that effectively brought an end to the Monti II Regulation, which was the Commission's attempt to deal with the fall-out from *Viking* and *Laval*. 'Proposal for Council Regulation on the exercise of the right to take collective action within the context of freedom of establishment and the freedom to provide services' COM(2012) 130 final

The thesis postulated, in its final chapter, that it is possible to offer greater legal space to the Member States when free movement conflicts with fundamental rights, in order better to reflect the Union's contemporary goals whilst still conforming to its ongoing constitutional requirements. It argued for the introduction of a balancing model, which recognises the equal status of conflicting norms and accordingly triggers the introduction of different proportionality questions. Specifically, rather than focusing on whether fundamental rights measures are proportionate in light of the restrictions they place on free movement, balancing seeks to reconcile and find compromise between conflicting rules and to locate an outcome that is least restrictive of both norms. Crucially, through the process of *reciprocal* proportionality assessment, which creates the legal space for examination of the impact of free movement on fundamental rights, balancing is able to accommodate the Union's commitment to fundamental rights and to minimise the trio of negative fundamental rights impacts, outlined above, that currently arises under the breach/justification methodology.

Chapter five recognised that there were practical and conceptual obstacles to the introduction of a balancing model but argued that these could be overcome. It was accepted that equal legal status does not itself provide a means of resolving tensions between free movement and fundamental rights. However, relying on Alexy's approach to the law of balancing, the chapter postulated that the focus should be on the relative effects of free movement and fundamental rights on each other through a process of mutual impact assessment.[12] The final outcome should seek, where possible, to impose the fewest possible restrictions on *both* free movement and fundamental rights and to ensure their effectiveness in real terms. It was argued that the CJEU should provide overarching guidelines on the impact of Member State activity on the internal market. For instance, direct discrimination might be presumed to have a serious impact on free movement, whereas the level of interference would have to be demonstrated in relation to restrictions to market access. Regardless, in all cases this would still have to be weighed against the effect of free movement on fundamental rights. Although this necessarily requires subjective assessments, this can be mitigated by the preliminary reference procedure, and oral and written submissions to the CJEU. Crucially, final decisions must be left to domestic courts that, being closer to the facts of the case and to the social and

[12] R. Alexy, *A Theory of Constitutional Rights*, (OUP, 2010), 102

cultural environment of the particular Member State, are better placed to conduct the final analysis.

It is accepted that balancing will not be viewed by all as a solution to the structural subjugation of fundamental rights to the free movement provisions. For many, free movement, as an ongoing tool for economic integration, does not qualify for fundamental rights status. From this viewpoint, balancing still gets the emphasis wrong. However, since the theoretical justification for the protection of fundamental rights, within this thesis, rested on their existence as a social fact, it was crucial to recognise the constitutional significance of free movement within the Union legal order, not just to economic integration but to the Union citizen. Accordingly, the chapter argued that free movement should be considered as (equal to) a fundamental right for several reasons. First, the free movement provisions can be seen as embodying the fundamental right to move, recognised by Article 2, Protocol 4 ECHR, within the geopolitical space created by the Union. Similarly, it represents a new level of abstraction for the fundamental rights to property, to conduct a business and to pursue an occupation. The personal free movement provisions feature in the Union's Charter while even the non-personal free movement provisions facilitate the exercise, by Union citizens, of their individual fundamental right to move. Finally, all of the free movement provisions trigger conflict between different Member State definitions of accepted fundamental rights. Hence, while the treatment of the free movement provisions as fundamental rights will be problematic for some, its attractiveness nevertheless lies in its ability to offer practical solutions to ensuring the effective protection of fundamental rights within the reality of the internal market.

Thus, the thesis has demonstrated not only that the two-stage breach/justification model is ill-equipped to cater for the contemporary constitutional framework but also that there exists a potential alternative that would still comply with the Union's ongoing constitutional requirements. Indeed, over the course of writing this thesis, there has been a growing support for balancing within the commentary.[13] However, writers, including myself, have perhaps been overly encouraged by post-Lisbon nods to balancing in the primary law context.

[13] V. Trstenjak, E. Beysen, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case-Law of the CJEU', (2013) ELRev 293; S. de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9(1) ULR 169; C. Barnard, S. Deakin, 'European Labour Law after *Laval*' in M. Moreau (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar 2011), ch.16; c.f. C. O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 CMLRev 1643

Although Advocate General Trstenjak explicitly called for reciprocal proportionality assessment in *Commission v Germany*,[14] the Court, while adopting a similar approach, did not explicitly endorse her methodology. Crucially, within the post-Lisbon case-law, it is still the two-stage framework that dominates.[15] Thus, while other Advocates General, such as Advocate General Cruz Villalón, have also seemingly recognised the need for a reconfiguration of the relationship between free movement and opposing law and policy since the coming into force of the Lisbon Treaty,[16] this is yet to be reflected in the more sluggish response of the Court itself. Interestingly, this can be contrasted with the Court's speedier reaction to the post-Lisbon environment in the field of secondary law where balancing by reference to the Charter has become commonplace.[17] The Court's apparent reluctance to update its adjudicative methodology might lie, therefore, in the historical entrenchment of the two-stage model by the constitutional trinity discussed in chapters two, three, and four. And yet, the same constitutional drivers of change, for instance, the broader aims of the contemporary Treaty, the eventual formal accession of the Union to the ECHR, the primary law status of the Charter and an evolved, more inclusive approach to Union citizenship can all also be viewed as *vehicles for* adjudicative change. Since they all call for a more holistic approach to the Treaty, they can be seen as means of overcoming the historical and out-dated entrenchment of a structural preference for free movement.

However, during the final edits of this thesis, the Court also handed down *Opinion 2/13* concerning the draft agreement on EU accession to the ECHR. In that Opinion, the Court reiterated that fundamental rights 'must be ensured within the framework of the structure and objectives of the EU'. It stated that the pursuit of those objectives is entrusted to a series of fundamental provisions, *inter alia*, the free movement provisions 'which are part of a framework of a system that is specific to the EU [and] are structured in such a way as to contribute – each within its specific field and with its own particular characteristics – to the implementation of the process of integration that is the *raison d'être* of the EU itself'.[18] On the one hand, as has been suggested by O'Neill, the Opinion 'appears to be more about the

[14] Case C-271/08 *Commission v Germany* [2010] EU:C:2010:183 (Opinion), EU:C:2008:492 (judgment)
[15] Case C-549/13 *Bundesdruckerei GmbH v Stadt Dortmund* [2014] EU:C:2014:2235; Case C-197/11 *Libert* [2013] EU:C:2013:288; Joined Cases C-344/13 and C-367/13 *Blanco* [2014] EU:C:2014:2311
[16] Case C-515/08 *Santos Palhota* [2010] EU:C:2010:245
[17] Case C-544/10 *Deutsches Weintor* [2010] EU:C:2012:526; Case C-283/11 *Sky Österreich*, [2013] EU:C:2013:28; Case C-70/10 *Scarlett* [2011] EU:C:2011:771; Case C-12/11 *McDonagh* [2013] EU:C:2013:43
[18] *Opinion 2/13* [2014] EU:C:2014:2454, para.172

Court of Justice's fears about its constitutional position'.[19] On the other, it might also suggest something of an historical hangover, from the days when the internal market was the sole goal of the EEC and free movement its essential tool, in the Court's perception of the contemporary constitutional framework. Thus, while the Court has often been at the forefront of pushing the boundaries of EU law and broadening the Union's constitutional remit, strangely, as yet, this has not been accompanied by the simultaneous adaptation of its own conceptual architecture.

[19] A. O'Neill, EUtopia Law, http://eutopialaw.com/2014/12/18/opinion-213-on-eu-accession-to-the-echr-the-cjeu-as-humpty-dumpty/, last accessed 16/01/15

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